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MASSACHUSETTS REPORTS

133

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

MAY 1882—DECEMBER 1882

JOHN LATHROP
REPORTER

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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS MORTON, CHIEF JUSTICE.

HON. WILLIAM C. ENDICOTT.

(Resigned, October 31, 1882.)

HON. OTIS P. LORD.

(Resigned, December 8, 1882.)

HON. WALBRIDGE A. FIELD.

HON. CHARLES DEVENS.

HON. WILLIAM ALLEN.

HON. CHARLES ALLEN.

HON. WALDO COLBURN.

(Appointed, November 10, 1882.)

ATTORNEY GENERAL

HON. GEORGE MARSTON.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

FREDERICK H. VIAUX & another *vs.* OLD SOUTH SOCIETY IN
BOSTON.

Suffolk. March 17, 1881; March 9. — May 13, 1882.

The defendant employed the plaintiff as a real-estate broker to sell his estate. The plaintiff rendered some services in attempting to sell the estate to P., who at one time thought of buying it, but abandoned the idea. A subscription was raised for the purpose of preserving the building standing on the estate as an historical monument. A committee of the subscribers employed C. as their agent, and he entered into negotiations for the property which resulted in an agreement by the defendant to sell it. Neither the plaintiff nor P. had any connection with these negotiations. The subscriptions were not sufficient to pay the price agreed upon, and it was necessary to borrow a large sum of money upon a mortgage of the estate. The lender required that the mortgage note should be signed by some known responsible person, and thereupon the committee induced P. to take the conveyance to himself and to sign the mortgage and note. *Held*, that P. was not a purchaser of the estate, even if the information furnished him by the plaintiff induced him to take the position he did in regard to the property, within the meaning of a usage that a broker, whose services are accepted by the seller, and who introduces the seller to a purchaser, is entitled to a commission upon the amount for which the estate is sold, if ultimately purchased by the person so introduced, whether the sale is finally effected by the same broker or by another person.

CONTRACT, by real-estate brokers doing business in Boston, to recover a commission on \$400,000, the price received by the defendant, a religious corporation, for the land and meeting-house thereon, formerly owned by it, at the corner of Milk Street

and Washington Street in Boston. Trial in the Superior Court, before *Allen, J.*, who allowed a bill of exceptions, in substance as follows :

There was evidence that the plaintiffs were employed as brokers by the defendant to effect a sale of said property ; that they were the first to call the attention of Royal M. Pulsifer to the property, and introduced him to the defendant as a customer ; and that thereupon the plaintiffs had many interviews and some correspondence with Pulsifer and the defendant, and informed Pulsifer of the value, rental capacity and advantages of the property, and endeavored to induce him to make the purchase. By the terms of sale given to the plaintiffs by the defendant, the buildings were to be removed and the land sold.

The following deeds, all dated October 11, 1876, were put in evidence :

1. A deed from the defendant to Royal M. Pulsifer of the land, describing it by metes and bounds, by the terms of which the grantee was to pay the taxes of that year, the grantor reserving the right to enter upon the premises and to take down the church edifice thereon, in case of any breach of the indenture immediately following.

2. An indenture between the same parties, whereby the defendant conveyed to Pulsifer the meeting-house on the land conveyed by the deed, on the "express condition that said building shall not at any time during the period of thirty years from the date of this indenture, be used for any business or commercial purpose, and shall be used during said period for historical and memorial purposes only, and that it shall not at any time during said period be used for any purpose whatever on Sunday, except so far as necessary for the care and preservation of said building and contents."

3. A mortgage deed, of the entire estate, from Pulsifer to the New England Mutual Life Insurance Company, to secure the payment of Pulsifer's promissory note in the sum of \$225,000, payable in three years from date, with interest at the rate of six per cent per annum, payable semiannually. The deed contained covenants of seisin and warranty, an agreement by Pulsifer to pay all taxes and assessments levied on the estate, and the usual power of sale.

4. A conveyance in mortgage, subject to the above mortgage, from Pulsifer to Henry Lee, trustee, the condition of which was the payment of \$75,000, without interest, in two years, if the estate, subject to the prior mortgage, should "be sufficient therefor, but not otherwise."

5. A declaration of trust by Pulsifer, which, after reciting the foregoing deeds, proceeded as follows: "I do hereby declare, that I hold said land and building subject to said mortgages in trust: To permit Henry P. Kidder and Henry Lee, both of Boston, in the county of Suffolk and Commonwealth of Massachusetts, and the survivor of them and their or his assigns, to occupy and use said estate and building for such purposes as he or they may elect or direct in writing, consistently with the terms of the conveyance of said estate and building to me, during such time as they or their assigns shall pay the interest upon said first-named mortgage debt and taxes, and that I will on the payment of said mortgage debt, or upon my being indemnified to my satisfaction against loss by reason of my having incurred said mortgage debt, convey said property to said Kidder and Lee, the survivor of them and his or their assigns, or to such person or persons or corporation as they or the survivor of them or their assigns may designate in writing, by a quitclaim deed, with covenants against incumbrances made or suffered by me except as aforesaid, and with release of dower. If the principal amount of said first-named mortgage debt is not paid on or before maturity, according to the terms of said mortgage, or if I am not indemnified and saved harmless therefrom to my satisfaction as aforesaid, on or before its maturity, or if the interest due thereupon shall at any time be in arrears for more than the period of five months, I reserve the right to sell such mortgaged estate and property at my discretion at public auction, after advertising said sale for at least thirty days in two newspapers published in said Boston; and in case of such sale, after applying so much of the proceeds thereof as shall be necessary to pay said mortgage debt, or so much thereof as shall then remain unpaid, with interest, together with all the needful and proper costs and expenses of such sale, to pay over the balance of such proceeds to said Kidder and Lee, or the survivor of them or his or their assigns."

It was proved that there exists in Boston a general and well-established usage that a broker, whose services are accepted by the seller, and who introduces the seller to an ultimate purchaser, is entitled to a commission upon the amount for which the estate is sold, if ultimately purchased by the person so introduced, whether the sale is finally effected by the same broker, or by another person.

It was also in evidence that, in June 1876, the defendant informed the plaintiff, Viaux, that it was decided that the estate should be sold by public auction; that Viaux repeated this to Pulsifer, and Pulsifer then said to him that, if the estate was going to be sold by auction, he would prefer to take his chances at the auction rather than buy at private sale, and Viaux had no further communication with Pulsifer until after the deed was made to him; that on June 13, 1876, the building was sold by public auction to one Roberts, on condition that the same should be removed in thirty days; that subsequently Roberts assigned his interest to other parties, who reassigned to the defendant, before the indenture of October 11, 1876, was executed; and that the land was never sold by auction.

The defendant offered evidence tending to show that, immediately after the sale to Roberts, at a public meeting held in the meeting-house, a committee was appointed for the purpose of raising funds to preserve the building for an historical monument, and, after various negotiations with the defendant and delays, Henry Lee was appointed treasurer of the preservation committee, and he thereupon employed Charles U. Cotting to negotiate for the purchase of the land and building for an historical monument, in the course of which certain letters were written by Cotting, as agent, to the chairman of the standing committee of the defendant, which resulted in the defendant offering, on September 15, 1876, to sell the estate, on certain terms and conditions, which offer was accepted on September 19, 1876; that at the time of Cotting's first letter, August 23, 1876, the committee had, or were promised, \$175,000 towards the price demanded for the property; and that after the refusal, on August 24, 1876, of the defendant to sell except for cash, they applied, through Cotting, to the New England Mutual Life Insurance Company, for a loan of \$225,000, and the company

agreed to lend this amount on the note of some person satisfactory to it, secured by a first mortgage of the property; that, at the request of Robert R. Bishop, who was acting with Lee on behalf of the committee, Pulsifer agreed to sign said note, and the company accepted him as satisfactory; that, on the day of the date of the several deeds, representatives of the preservation committee and the defendant met Pulsifer at the office of the company, Pulsifer signed the mortgage note, the papers in evidence were executed by the several parties thereto, and the \$225,000, lent by the company, added to the \$175,000 from the preservation committee, were paid over, in the presence of all the parties, to the defendant, and that since the execution of the papers Pulsifer had had nothing to do with the management of the property, excepting in signing leases to tenants of certain parts of it; that all the arrangements for raising the money under the mortgage were made before Pulsifer was requested to act as he did; that Pulsifer, personally, had nothing to do with Cotting, or the contract for the sale of the property, except as stated; and that the property was ample security for an amount of \$225,000, and the prospect of personal liability on the part of any signer of the mortgage note was remote.

The defendant contended that Cotting had acted as the agent of the preservation committee, which, therefore, had bargained for and purchased the property; and that Pulsifer was a trustee for the committee's benefit, and not the purchaser of the property.

The plaintiffs admitted that they had no connection with the preservation committee or Cotting, but introduced evidence tending to show that after the defendant had, on August 24, 1876, refused to consider anything but a cash offer for the property, the preservation committee and Cotting had unsuccessfully applied to the Massachusetts Hospital Life Insurance Company and the New England Mutual Life Insurance Company for a loan of \$225,000 on the security of the property itself, without personal liability on the part of anybody; that in order to raise the price and accomplish their object it then became necessary to have somebody sign the mortgage note; that the names of several persons were talked over and considered as likely to consent so to do, and that Cotting, being one of the persons who

was asked to sign it before Pulsifer was, refused to do so, alleging as a reason that he was agent for so many estates; and that, in fact, the money was raised by the preservation committee, and the contract price was obtained by Pulsifer's signing the mortgage note and borrowing the money of the company, and by Pulsifer's taking the position which he did with regard to the property at the time of the execution of the papers.

Pulsifer, a witness for the plaintiffs, in answer to the question whether or not the statement made to him and information given him by the plaintiff Viaux, and the conversations had with him by Viaux, were the cause which induced him to act as he did with reference to the property, answered: "Indirectly, yes; that is, by my interviews with Viaux I had become familiar with the property as to its present value, as I thought, and possibly its prospective value." On cross-examination, Pulsifer testified, that when the property was first presented to him he was looking for a site for the office of the Boston Herald, a newspaper; that the site where that office now is had been purchased by him several years before, and that he determined to build there in the first part of the winter of 1876-77; that he never made any bargain for or purchased the Old South Church property, nor furnished any money for paying for it except a subscription made to the preservation committee; that he had the papers made to him at the request of Bishop, which request and his assent were in August 1876; that Bishop must have told him how much money was going to be paid down by the committee, because he knew, when he agreed to give the mortgage, what the amount of it was to be; that Bishop requested him to take the property, and told him what he wanted him to do, and wanted him to sign a note and mortgage for \$225,000; that he thought it was a safe thing to do; that the papers were all signed and delivered at one time; that the \$175,000 paid down by the committee was in the shape of certificates of deposit issued by the Commonwealth Bank and another bank, and came through Lee, Higginson and Company; that he had known the value of the Old South Church property for several years, and that he thought he should have known on his own judgment that the property was worth more than \$225,000; that he had nothing to do with the negotiating for, or borrowing of, the

\$225,000 except giving the note ; that since he took the deed he had had nothing to do with the property except to sign several leases, which he had done at the request of Lee or Bishop, and had paid nothing towards interest or taxes, or care or management of the estate ; and that when he took the deed he had not, nor has he had since, any expectation of becoming the owner of the property. On re-direct examination, he testified that he expected that Lee and Bishop or the preservation committee would some day come to him, indemnify him on his mortgage, pay him all up, and ask him for a quitclaim deed ; and that when they did so, and all the conditions in the agreement with him were fulfilled, he would give them a quitclaim deed, because he had agreed to do so ; that the \$225,000 was lent to him by the New England Mutual Life Insurance Company on his mortgage note, and that he was present when the \$225,000 was paid over by the company, and this and the \$175,000 was paid the defendant, although he could not remember whether the checks actually went into his hands or not.

The plaintiffs further put in evidence that Bishop, in requesting Pulsifer to act as he did, had talked with him only twice about the matter, for not longer than from five to ten minutes each time, and on both occasions, incidentally, at meetings of a committee of the government of the city of Newton, of which they were both members, and that on the day after the latter of these conversations, August 3, 1876, Pulsifer, by telegram to Bishop, acceded to his request.

The plaintiffs requested the judge to instruct the jury that it was a question of fact for them whether the efforts of Viaux were a material part of the cause that induced Pulsifer to take the position he did in regard to the property, and whether it was through Pulsifer's taking that position that the sale was effected ; and that whatever Pulsifer's position with reference to the property and parties was, whether he was purchaser, trustee, or what not, if the jury found that the efforts of the plaintiffs were material in inducing a sale, the plaintiffs were entitled to recover.

The judge refused to give these instructions ; but ruled that the only question for the jury was whether or not Pulsifer was a purchaser of the property, in which case the plaintiffs would

be entitled to recover under the usage, and, otherwise, not ; that the purchaser is one by or on behalf of whom the bargain or contract of sale is made ; that it was for the jury to say whether Cotting was acting for Pulsifer or for others ; and that if Cotting was not acting for Pulsifer in his negotiations with the defendant, and when he wrote the letter of September 10, Pulsifer was not the purchaser, unless he afterwards became so ; that although Pulsifer took the deed, yet if it was proved that he took it merely as a trustee, at the request and for the benefit of other parties who had arranged for the purchase from the defendant, assuming no control or management of the property himself, he would not be a purchaser ; that it appeared that Pulsifer had an interest in the property ; that he took it, or looked to it, to secure him against a liability of \$225,000, and that he would not be a purchaser if he merely retained an interest in the property as security for money which he had advanced at the request of other parties who had bargained for it ; nor would he be a purchaser if he coupled the holding of the property in trust for the benefit and under the control of such other parties with the holding of the same as security for money advanced, or for a liability incurred by him at the request and for the benefit of such other parties ; and that, in order to constitute Pulsifer a purchaser, he must have been one who made the bargain, or who was concerned in it, or who advanced money on his own account for his own benefit or on his own responsibility.

The jury returned a verdict for the defendant ; and the plaintiffs alleged exceptions.

C. H. Hill & W. S. Macfarlane, for the plaintiffs. 1. The ruling requested should have been given, and the instructions given were erroneous. Whether Pulsifer was the purchaser is a question of law depending on the construction of the several papers which passed between the parties. These papers show that Pulsifer is in law the owner of the property. He has a large insurable interest therein ; he is responsible as owner for taxes and betterments, and is liable for torts growing out of the condition of the building. The mortgagee is clearly not the owner ; and Kidder and Lee are merely *cestuis que trust* of an equity of redemption, with the right to have the estate conveyed to them when Pulsifer is fully indemnified.

2. It is immaterial whether Pulsifer purchased for his own benefit or for a *cestui que trust*. If the intervention of the plaintiffs was the efficient cause of his consenting to accept a conveyance of the property, and to advance the money necessary to complete the purchase, the plaintiffs have performed their part of the contract, and have found a purchaser for the property. If a purchaser, introduced by a broker to a vendor, at first intended to buy the estate for his own use, it would be no defence to a suit for the commission that he finally bought it for a *cestui que trust*; and, so long as the estate is sold, the vendor has no interest as to the capacity in which the purchaser takes it.

Under the usage proved at the trial, and which is the same as exists generally in this country and in England, if the plaintiffs were the efficient cause of Pulsifer's purchase of the property, they are entitled to recover; and the fact that the sale was ultimately completed without their assistance does not affect their right to their commission. *Bornstein v. Lans*, 104 Mass. 214. *Loud v. Hall*, 106 Mass. 404. *Rice v. Mayo*, 107 Mass. 550. *Pope v. Beals*, 108 Mass. 561. *Chapin v. Bridges*, 116 Mass. 105. *Lloyd v. Matthews*, 51 N. Y. 124. *Sussdorff v. Schmidt*, 55 N. Y. 319. *Murray v. Currie*, 7 Car. & P. 584. *Wilkinson v. Martin*, 8 Car. & P. 1. *Cunard v. Van Oppen*, 1 F. & F. 716. *Mansell v. Clements*, L. R. 9 C. P. 189. *Green v. Bartlett*, 14 C. B. (N. S.) 681. *Rimmer v. Knowles*, 30 L. T. (N. S.) 496; *S. C.* 22 W. R. 574. *Bayley v. Chadwick*, 39 L. T. (N. S.) 429. *Wilkinson v. Alston*, 48 L. J. (N. S.) Q. B. 733; *S. C.* 41 L. T. (N. S.) 394.

The evidence in the case is very strong that the sale was directly owing to the intervention of the plaintiffs. Pulsifer testified that, from his interviews with Viaux, he had become familiar with the property as to its present value, and possibly its prospective value; and that, after two accidental interviews with one of the committee, not more than five or ten minutes long, he consented to advance the requisite money, which others, who were interested in the preservation of the building, and who must have had a general acquaintance with it, had refused to do. This therefore brings the case within the usage proved, and within the principle of the cases cited above.

N. Morse & L. M. Child, for the defendant.

MORTON, C. J. The evidence tended to show that the defendant employed the plaintiffs as real-estate brokers to effect a sale of its property at the corner of Washington Street and Milk Street in Boston. There was no evidence of any contract by the defendant that the plaintiffs should have the exclusive right to sell the property, or that they should be entitled to any commissions except upon a sale effected by them. The plaintiffs relied upon a usage that a broker, whose services are accepted by the seller, and who introduces the seller to an ultimate purchaser, is entitled to a commission upon the amount for which the estate is sold, if ultimately purchased by the person so introduced, whether or not the sale is finally effected by the same broker or other parties. Under the contract implied by the employment of a person as a broker, as modified by this usage, the broker becomes entitled to his commissions when he has found a purchaser and has brought the parties together, if a sale is made to the purchaser. But he is not entitled to recover, unless he finds and introduces a person who becomes a purchaser. *Tombs v. Alexander*, 101 Mass. 255. *Loud v. Hall*, 106 Mass. 404.

It appeared in this case that the plaintiffs rendered some services as brokers in attempting to sell the property to Royal M. Pulsifer, which would have entitled them to their commissions if Pulsifer had purchased the estate. At the trial, the court so ruled in favor of the plaintiffs, and left it to the jury, under instructions as to what would constitute a purchaser, which are not open to exception, to determine whether Pulsifer was a purchaser of the property. The finding of the jury to the effect that he was not the purchaser is conclusive against the plaintiffs' right to recover, unless the undisputed facts show, as matter of law, that he was a purchaser. We are of opinion that the facts do not show this. The evidence clearly shows that Pulsifer at one time thought of buying the estate for the purposes of his business, but that he abandoned this idea. A subscription was raised for the purpose of preserving the Old South Church standing on the estate as an historical monument. Henry Lee and others, a committee of the subscribers, employed one Cotting as their agent, and he entered into negotiations for the property which resulted in an agreement by the defendant to

sell the property. Neither the plaintiffs nor Pulsifer had any connection with these negotiations.

The subscriptions were not sufficient to pay the price agreed upon, and it was necessary to borrow a large sum of money upon a mortgage of the estate. The lender required that the mortgage note should be signed by some known responsible person, and thereupon the committee induced Pulsifer to take the conveyance to himself, and to sign the mortgage and note. He had nothing to do with the purchase. He had no interest in the estate. He consented to take the deed and execute the mortgage and note as a mere trustee or conduit to carry out the purposes of the committee, who were the real purchasers. There is no more reason for calling him the purchaser, within the meaning of the usage relied upon by the plaintiffs, than there would be if he had directly lent the money and taken a mortgage to himself. The facts conclusively show that he was not such purchaser.

The view we have taken makes it clear that the court rightly refused the plaintiffs' request for instructions. Under their contract they could only recover upon proof that they found and introduced the person who became the ultimate purchaser. Even if the information furnished by the plaintiffs to Pulsifer induced him to take the position he did in regard to the property, and if thus the efforts of the plaintiffs were material in inducing the sale to the committee, the plaintiffs cannot recover, because such are not the terms of their contract. The defendant never promised to pay them commissions except upon the condition that they procured a purchaser, which they failed to do.

Exceptions overruled.

ISAAC AYLING *vs.* MARY KBAMER.

Suffolk. Jan. 11. — May 13, 1882. LORD, FIELD & C. ALLEN, JJ., absent.

A conveyance of a lot of land was subject to the "conditions" that "no dwelling-house or other building except necessary out-buildings shall be erected or placed on the rear of the said lot," and that "no buildings which may be erected on the said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for the term of twenty years" from a certain day. *Held*, that these were to be construed as restrictions, and not as conditions, and constituted a breach of a covenant against incumbrances in a subsequent deed.

On a bill in equity involving the construction of a deed of land containing certain "conditions" so called, there was evidence from a plan annexed to the deed, and from other deeds of adjoining and neighboring estates, that the conditions were a part of a general plan of improvement, and they were construed as restrictions. In a subsequent action involving the construction of the same deed, at the argument on the defendant's exceptions, the defendant contended that the judge who tried the case erred in giving the same construction to the deed as this court had formerly given, on the ground that the deeds of the adjoining and neighboring estates were not put in evidence. *Held*, that, as he had not called the attention of the judge to this omission in the evidence, the point was not open to him.

In an action for a breach of the covenant against incumbrances in a deed of land, evidence of the original agreement of the owner to convey the land to a person who assigned the agreement to the grantor of the defendant, the deed to such grantor having been given in pursuance of the agreement, is inadmissible.

MORTON, C. J. This is an action to recover damages for a breach of the covenant against incumbrances, contained in a deed from the defendant to the plaintiff.

The city of Boston, by its deed dated July 3, 1862, conveyed the land in question to Mary Ann Carter. This deed, after the description and before the habendum, contained the provision that "this conveyance is also subject to the following conditions: 1. All taxes and assessments which have been laid or assessed upon the said premises previous to the execution of this conveyance shall be paid by the said Mary Ann Carter, her heirs and assigns. 2. The front line of the building which may be erected on the said lot shall be placed on a line parallel with and ten feet back from the said Newton Street. 3. The building which may be erected on the said lot shall be of a width equal to the width of the front of the said lot. 4. No dwelling-house or other building except necessary out-buildings shall be

erected or placed on the rear of the said lot. 5. No buildings which may be erected on the said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house, for the term of twenty years from the first day of April, A. D. 1859. 6. And the said Mary Ann Carter shall erect a brick wall along the line of the rear of the above-described land, of not less than five feet above the grade of said passageway as the same shall be hereafter established by the said city. The buildings now standing on the said land conform to the requirements of the foregoing conditions." The land by mesne conveyances came to the defendant, who conveyed it to the plaintiff by a deed containing the usual covenants.

We are of opinion that the so-called conditions in the deed to Carter were not intended or understood by the parties to be technical conditions, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land, and are to be construed as restrictions. *Episcopal City Mission v. Appleton*, 117 Mass. 326. *Skinner v. Shepard*, 130 Mass. 180. This same deed was before this court for construction in *Keening v. Ayling*, 126 Mass. 404; and, although the question is not discussed in the opinion, that case proceeded upon the assumption that they were restrictions imposed as a part of a general scheme of improvement, which might be enforced in equity by the owners of the adjoining estates, and created equitable easements which constituted a breach of the covenants against incumbrances. It is true that it appeared affirmatively in that case, by the production of the plan annexed to the Carter deed, and of other deeds of adjoining and neighboring estates, that the restrictions were a part of a general plan of improvement.

The defendant now contends that the Superior Court erred in giving the same construction to this deed, because these collateral and surrounding facts were not affirmatively shown in the case at bar. We are of opinion that this ground is not fairly open to him. The parties presented to the presiding justice of the Superior Court, for his construction, a deed which had once

been construed and its legal effect determined by this court. If the defendant intended to controvert any of the facts which had aided the court in the previous construction of the deed, good faith in the conduct of the trial required that he should call the attention of the presiding justice to his purpose, or to the omission of the plaintiff to make formal proof of these facts. If he had done so, the omission could have been readily supplied, all the necessary facts being matters of record. By asking the presiding justice to construe this deed, in the light of the decision in *Keening v. Ayling*, and making no suggestion that the facts there appearing of record were not true, he tacitly admitted them, and he ought not now to be heard to object that they were not formally proved at the trial.

The plaintiff claimed only under the fourth and fifth restrictions, and we are of opinion that the court rightly ruled that "clauses fourth and fifth were restrictions binding upon the estate at the time of the making of the covenant sued upon, and were incumbrances upon the estate within the meaning of the covenant sued upon;" and that the several rulings to the contrary requested by the defendant were rightly refused.

The evidence of the original agreement of the city of Boston to convey this lot to one Wheeler, assigned by him to said Carter, was properly rejected. It had been superseded by the deed to Carter given in pursuance of it. If it agreed with the deed, it was immaterial; if it differed, the deed, being the later contract, must control and could not be varied by it.

Exceptions overruled.

J. A. Maxwell, for the defendant.

S. W. Creech, Jr., for the plaintiff.

ALBERT L. MURDOCK *vs.* BOSTON AND ALBANY RAILROAD
COMPANY.

Suffolk. March 13. — May 13, 1882. ENDICOTT & DEVENS, JJ., absent.

At the trial of an action of contract for a breach of the agreement of a railroad corporation to carry the plaintiff as a passenger on its railroad from S. to N., it appeared that he bought a ticket at S. which entitled him to be carried to N.; that the defendant's conductor refused to receive the ticket, and, when the train arrived at an intermediate station, the conductor, who was a railroad police officer, arrested the plaintiff for evading his fare, and delivered him into the custody of two police officers, who detained him during the night in the place provided for arrested persons. *Held*, that the detention of the plaintiff during the night, his discomforts in the place of detention, illness produced by the dampness of the cell in which he was confined, and the indignities which he suffered at the hands of the police officers, were not elements of damage, which he could recover in this action.

MORTON, C. J. This is an action of contract to recover damages for a breach of the defendant's contract to carry the plaintiff as a passenger on its railroad from Springfield to North Adams. It appeared at the trial that the plaintiff bought a ticket at Springfield, which entitled him to be carried to North Adams; that the defendant's conductor refused to receive the ticket, and, when the train arrived at Pittsfield, the conductor, who was a railroad police officer, arrested the plaintiff for evading his fare, and delivered him into the custody of two police officers of Pittsfield, who detained him during the night in the place of detention provided for arrested persons. The learned justice who presided in the Superior Court ruled that the plaintiff was entitled to recover damages for this arrest and imprisonment, for indignities which the plaintiff contended that he suffered at the hands of the Pittsfield police officers, for his mental suffering, and for sickness produced by a cold caught while confined.

The distinction between the rules of damages applicable in actions of contract and of tort appears to have been overlooked at the trial. Without inquiring whether all the elements of damage admitted by the court would be competent, if this had been an action of tort for an assault and false imprisonment, we are of opinion that too broad a rule was adopted in this case. Damages for a breach of a contract are limited to such as are

the natural and proximate consequences of the breach, such as may fairly be supposed to enter into the contemplation of the parties when they made the contract, and such as might naturally be expected to result from its violation. The detention of the plaintiff during the night, his discomforts in the place of detention, the cold which he took by reason of the dampness of the cell, and the indignities he suffered from the police officers of Pittsfield, were not the immediate consequences of the breach of the defendant's contract to carry the plaintiff to North Adams. They were the results of intervening causes, not the primary, but the secondary, effects of the breach of contract; and are too remote to come within the rule of damages applicable in an action of contract. *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111. The plaintiff's remedy for these wrongs, if proved, is by an action of tort. The defendant was not required to be ready to meet and contest these questions under a declaration alleging a breach of a contract to carry the plaintiff to North Adams. *Exceptions sustained.*

R. M. Morse, Jr., for the plaintiff, was first called upon.

G. S. Hale & C. F. Walcott, for the defendant, were not called upon.

COMMONWEALTH, by Commissioners of Savings Banks, *vs.*
 READING SAVINGS BANK. William J. Holden & another,
 receivers, petitioners.

Suffolk. March 15, 1881. — May 15, 1882.

The by-laws of a savings bank, incorporated subject to the general laws of this Commonwealth relating to savings banks, made it the duty of the treasurer to enter deposits and payments in the books of the bank, and a duplicate of each entry in the book of a depositor; gave him charge of the books of account; and contained the following clause: "He shall draw all necessary papers and discharge all obligations of the corporation; and his signature shall be binding on the corporation." The treasurer, in some instances, borrowed money, representing that it was for the benefit of the bank, and gave his individual notes therefor, and, as collateral security for the notes, deposit-books of the bank, originally genuine and issued to himself or others, which showed certain sums to be still due from the bank, but which the bank had in fact paid to the original depositor in full; or gave as security books which contained entries in whole or

in part fictitious. Some of the books which were originally genuine contained assignments purporting to be signed by the depositors, but their signatures were either forgeries, or were procured by the fraud of the treasurer to assignments in blank, on his representations that the assignments were receipts. In other instances, third persons obtained money on such deposit-books, the treasurer fraudulently stating in writing over his signature, or orally, that the books were genuine, and that the bank owed the money to the persons appearing as assignors of the books. The persons lending the money acted in good faith; but none of the transactions appeared on the books of the bank, or were authorized by its trustees; and none of the money came into its possession. *Held*, that none of the acts of the treasurer were binding upon the bank, although it was the practice of savings banks in this Commonwealth to recognize in some form on their books assignments of deposit-books and the rights of the assignees.

UPON an application made by the commissioners of savings banks, under the St. of 1866, c. 192, § 5, the Reading Savings Bank had been enjoined from the further continuance of its business, and receivers had been appointed to take possession of its property and effects, for the purpose of settling its affairs.

The receivers filed a petition in the case, alleging that certain persons and corporations named had presented claims, to the amount of \$24,900, against the bank, by virtue of certain deposit-books, purporting to be issued by the bank, and to be held by said persons and corporations by assignment; that there was no evidence upon the books of the bank, that any sum was due upon any of the claims; and praying that all said persons and corporations be ordered to appear and submit their claims to be determined in such manner as the court might order.

The court referred the petition to a special master, to hear the parties, and ascertain and report to the court the facts with regard to each claim.

On the coming in of the master's report, the case was reserved by *Colt, J.*, upon said report, for the consideration of the full court. The facts appear in the opinion.

S. Bancroft, for the receivers.

A. Russ & W. G. A. Pattee, for the Faneuil Hall National Bank and the Monument National Bank.

E. Hutchinson, for the First National Bank of Chelsea.

D. C. Linscott, for the Metropolitan National Bank.

F. T. Greenhalge, for the Appleton National Bank of Lowell, Gyles Merrill and George T. Sheldon.

C. H. Fiske, for the Collateral Loan Company.

DEVENS, J. The record in this case discloses a series of various and extensive frauds, practised by the treasurer of the defendant corporation and others, sometimes aided by him, upon innocent parties, who were induced to part with their money upon his oral statements and upon the collateral security of alleged bank-books, forged or fictitious, or on which nothing was due. The holders of these books contend that the bank is responsible for the wrongful acts of its treasurer, and must treat these books as valid securities. The bank has derived no advantage from these transactions, and no portion of the money thus fraudulently obtained has found its way into its vaults or been expended for its use. The transactions proved were not shown by the official books of the treasurer, and were not authorized by any vote of the trustees. The liability of the bank is to be determined by ascertaining its responsibility for the acts of the treasurer by reason of the official relation he bore to it.

In some instances, money was borrowed by him, under the pretence that it was wanted for the bank, but in his own name, on the security of deposit-books originally genuine, issued to himself or others, the loans on which had been fully paid, but on which payment had not, by reason of his own fraud, been entered. When the books were originally payable to others, forged signatures to drafts for the money apparently due, and assignments of the books, were sometimes made; while sometimes, at the time of payment of the sums due from the bank, the depositor had been induced to sign his name to the draft (which was in blank on the deposit-book) and across the same as a receipt, which was afterwards fraudulently filled up as a draft and assignment by him. In some instances, books were used which were either entirely fictitious, or in which false entries had been made, so that they showed more to be due than was ever actually due from the bank. The assignments of books of this description as collateral security were recognized by the treasurer and assented to by indorsement thereon. In still other instances, loans were obtained by parties other than the treasurer upon books of the character above described, to the forged or pretended assignments of which the treasurer assented by his indorsement. Oral statements were also made by the treasurer as to these books, used both in

the loans made to him and to others, that they were all right, and that they showed what was due.

The Reading Savings Bank was incorporated on June 12, 1869, by the St. of 1869, c. 393, with all the powers and privileges, and subject to all the duties, liabilities and restrictions, then or which might thereafter be in force in relation to institutions for savings. A savings bank in this Commonwealth is an institution formed for the purpose of receiving deposits of money for the benefit of the depositors investing the same, accumulating the profit or interest thereof, paying such profit or interest to the depositor, or retaining the same for his greater security, and further of returning the deposit itself. The regulations as to the payments of interest and return of deposit are prescribed partly by statute and partly by the institution itself. There is no capital stock, and there are no stockholders who are entitled to receive profits from the business. All these belong to the depositors, and nothing is deducted therefrom except the necessary expenses of transacting the business. Its affairs are administered by a board of trustees, the securities in which the deposits shall be invested are prescribed by law, and returns are made to commissioners of savings banks, who may examine the institution at any time, so that the conduct of its affairs may be constantly under public supervision. Although termed a bank, it has few characteristics of a commercial bank of discount and deposit, a large part of whose business consists in dealing in exchange and negotiable paper for the benefit of its stockholders, and to which, when done by its proper officers, the rules of such dealing are applicable. It affords a convenient mode of taking care of sums individually small, (as only deposits to a limited amount are permitted,) but often large in the aggregate, and its purpose is a public advantage without any interest in the members of the corporation. *Huntington v. Savings Bank*, 96 U. S. 388. The character of the corporation cannot exonerate it from the legal responsibilities involved in the business which it was created to transact, and it must be liable for the acts of its officers done in the regular performance of their duties. *Reed v. Home Savings Bank*, 130 Mass. 443. But its character is of importance in deciding what the duties of its officers are, and in determining whether the acts done by them were in the performance of such

duties. Its officers cannot assume responsibilities or enter into transactions or contracts, express or implied, so as to involve the bank, unless such acts are clearly incidental to the duties imposed upon them.

The by-laws of the bank made it the duty of the treasurer "to enter all deposits and payments made to depositors in the books of the bank, and a duplicate of such entry in the book of the depositor, which shall be his voucher, and the evidence of the amount deposited;" to lay before the board of managers at specified times a statement of the concerns of the institution; to have charge of all books of accounts, moneys, papers and other securities, and property, and to be responsible for their safe-keeping. It is further added, "He shall draw all necessary papers and discharge all obligations of the corporation, and his signature shall be binding on the corporation." He is also to pay the current bills of the corporation, not exceeding the appropriation previously made, and to keep a complete record of vouchers for all his payments for exhibition to any member of the board of trustees.

These by-laws do not show any intention to make the treasurer a general agent to bind the bank in the administration of its affairs, or to hold him out as one authorized to pledge its credit; nor can it be inferred that he has any such right by virtue of his office. In *Dedham Institution for Savings v. Slack*, 6 Cush. 408, it was held that the treasurer of a savings bank had not authority to release a debt due, upon payment of a dividend thereon. In *Bradlee v. Warren Savings Bank*, 127 Mass. 107, it was held that he could not bind the bank by indorsing its name upon a promissory note, although in that case the bank had received the proceeds, and, further, that the provision that "his signature shall be binding upon the corporation," in a clause like that heretofore quoted, meant his signature to necessary papers, and in discharge of obligations to the corporation, and gave no authority to indorse.

The frauds committed in connection with the claims before us were perpetrated principally by the assertion by the treasurer, in various forms, that the bank was owing sums which it did not owe, in support of which fraudulent and fictitious bank-books were exhibited, assented to or recognized by him, upon

assignment whereof the claimants parted with their money. It appears that it is and has been the practice of savings banks in this Commonwealth to recognize assignments of the deposit-books of such banks, and the rights of the assignees therein, by an entry in some form on the books kept by such banks; that this was the practice of the Reading Savings Bank; and that national banks (who are included among the claimants) have been in the habit of lending money, taking such deposit-books as collateral security.

A transfer of a deposit may be shown by a delivery of the bank-book to the grantee, accompanied by an assignment thereof. As there can be no manual delivery of the credit which the depositor has with the bank, the delivery of the book, which represents the deposit and is the only evidence of the contract, together with the assignment, operates as a transfer of the existing fund, and is all the delivery of which the subject is capable. *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425. That, as between the depositor and the bank, it may be shown that an entry in a pass-book is an error, and that the depositor is not entitled to receive the sum stated, or that it has been paid, or that it has been taken from the bank by legal process, can hardly be controverted. If a cashier of a bank of discount should promise to pay a debt that the corporation did not owe, or should admit bills forged upon it to be genuine, the bank would not be bound by such promise or admission. *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 29. *Cocheco National Bank v. Haskell*, 51 N. H. 116. *Merchants' Bank v. Marine Bank*, 8 Gill, 96. Story on Agency, § 115. Where one receives credit on his pass-book for a check found afterwards not to be good, the entry may be cancelled. *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64. The maker of a certificate of deposit may overcome its effect by satisfactory proof that it is wrong. *Lacon National Bank v. Myers*, 83 Ill. 507. The entry, on the books of a bank, of a credit, is *prima facie*, and not conclusive, evidence. *Garland v. Salem Bank*, 9 Mass. 408. *Merchants' Bank v. Marine Bank*, *ubi supra*. Where also the deposit ledger of a bank and a depositor's pass-book both showed a deposit (which was proved to have been erroneously entered), and the money was paid thereon, it was held that it might be recovered

back as paid under mistake of fact. *McLean County Bank v. Mitchell*, 88 Ill. 52.

Unless there is a duty to third persons imposed on the treasurer by virtue of his office to state what the condition of a person's account is, so as to enable another to purchase the book or to lend money upon it as collateral security, a savings bank cannot be responsible for the frauds which are committed by means of forged, fictitious or paid-up books, to which the treasurer has given currency by statements that they accurately represent the sums due, by assenting to assignments thereof, or in other ways.

Without deciding what responsibility might be incurred by a commercial bank for the acts of its cashier, it is sufficient to say that the treasurer of a savings bank is an officer of much more limited powers. The cashier is the financial officer of the bank, through whom and by whom all its money operations are conducted, not only in paying or receiving debts but also ordinarily in discharging or transferring securities, and who may also certify deposits, or, when necessary for its transfer, indorse negotiable paper. *Matthews v. Massachusetts National Bank*, 1 Holmes, 396. The duties of the treasurer more nearly resemble those of the paying and receiving tellers of banks. Even where the acts of a cashier, within the scope of the general usage, practice and course of business, might bind the bank in favor of third persons, the guaranty or recognition by such officers of a liability has no such effect. A teller of a bank as such, it is held in *Mussey v. Eagle Bank*, 9 Met. 306, has no authority to certify a check as good so as to bind the bank to pay the amount thereof to any person who may afterwards present it; and a usage for him so to certify a check, to enable the holder to use it at his pleasure, is bad. A statement by a bank teller that an indorsement is genuine, does not bind the bank. *Walker v. St. Louis National Bank*, 5 Mo. App. 214. The books of a depositor are, it is said in *Pierce v. Boston Five Cents Savings Bank*, *ubi supra*, something more than mere statements of account, and partake of the nature of money securities. But, while this is so, they are open to all defences, in the hands of the depositor himself, which will show that there is nothing due on them; and they have no elements of negotiability by which additional value may be

imparted to them in the hands of third persons. As the bank is not responsible to any one to whom the treasurer has given a false, fictitious, or even erroneous credit, so it is not responsible to any one to whom such credit is transferred. The assignment can only operate, even if assented to by the treasurer, to convey the rights, if any, which the depositor has. The duty of the treasurer is to receive the deposits and to pay to those entitled thereto, and he can recognize assignments no further than as they are of sums actually due. While it may add to the negotiability of these books to make the bank responsible for the certification of the treasurer as to their correctness, no duty thus to certify is imposed upon him. Nor can it be inferred, as against the bank, that he has such authority from the use that has been made of these books in effecting loans. As it is no part of his duty to undertake to give a market value to, or obtain a market for, the negotiable paper of others, by indorsing it on behalf of the bank, so it is no part of his duty to complicate the simple contract which the bank makes with its depositors by other contracts, involving serious responsibility to third persons, entirely foreign and unnecessary to its legitimate objects.

Assignments and transfers of savings-bank books and accounts are made for the convenience of those who are parties to them, and there is no reason why the assignees should have higher rights than their assignors. Such transactions are of no benefit to the bank; and, in all that is done in reference to them, the treasurer is rather the agent of the parties than of the bank. It is no part of his duty, as treasurer, to state, for the benefit of others, what is due depositors, and the bank should not be made responsible for any failure on his part to make a correct statement. He has no more right to bind the bank to pay to a third person an account on which nothing is due, than he has to bind it to pay a depositor or pretended depositor what is not due.

We have dealt with the question as to the effect of a transfer of an account, which is erroneous, paid up or fictitious, by the person in whose favor it apparently exists with the bank. It is to be observed that in most of these claims either the draft or the assignment, and in some instances both the draft and the assignment, of the pretended accounts are forged. These forgeries are of three kinds: where the accounts were wholly fictitious,

and had been prepared in the name of fictitious persons, and the signatures were made in their names; where the accounts were originally genuine, but had been paid and not cancelled, or additional entries were made of sums pretended to be due, and the signatures of the persons in whose favor the accounts had once existed were forged; and where, in cases similar to those last stated, the person, in whose favor the genuine account had once existed, had been induced to place his name upon it as a receipt, and afterwards a draft or assignment had been fraudulently forged above it. If similar transfers were forged of accounts on which moneys were actually due, the bank would not be liable to the holders of the forged transfers. The fact that the accounts are merely pretended, and that nothing is due, cannot make a title to the claimants by means of these forgeries which shall enable them to assert, as against the bank, that the claims are good. This would be to make the bank liable for forgeries of the names of third persons committed by its treasurer in matters in which he had as such no concern. With the making of drafts and assignments for depositors he certainly had no proper connection.

We proceed to consider very briefly the several claims as reported. All do not require the application of the principles we have been discussing, as they could be disposed of on other well-settled grounds. But all are included within them, and, if those principles are correct, may safely be decided by them.

In the claim of the Faneuil Hall National Bank, money was borrowed by Pratt, the treasurer, on the statement that it was for himself, on his promissory note and the security of two bank-books of other persons, which he held, as he stated, as investments. After the original loan was made, some change was made in its amount and the securities, but the Faneuil Hall Bank now holds, as security for its loan, three pass-books; one payable to Pratt himself, which had been fully paid long before its transfer to the claimant. The other two are books once genuine, on which nothing was due when transferred, they having been previously fully paid; no entry of the payment having been made in one, while, in the other, fictitious entries had been made showing more to be due than actually had ever been due. On both these last books, the signatures which purported to

assign them were forgeries, as well as those to the drafts. Pratt promised to make the proper entries in the books of the Reading Savings Bank to show the assignments, but never did so, and afterwards said he had done so. That the acts and declarations of Pratt amounted to a direct representation that these books were proper vouchers, is clear. But unless we are prepared to hold that it is in the power of the treasurer, by means of a book representing a sum to be due from a savings bank which is not due, to make the bank responsible to one who honestly receives it as collateral security, there can be no claim on the book made in the name of Pratt himself. The question as to the other books has the additional element that the drafts and assignments which purported to transfer them were forgeries. We have already stated our reasons why no such transactions, even though the active agent in them was its treasurer, should be allowed to establish a liability against this corporation.

The claims of the Monument National Bank, the First National Bank of Chelsea, and Gyles Merrill, like that of the Faneuil Hall Bank, are cases in which the loan was made to Pratt, sometimes upon the statement that money was wanted for the bank; but they all are loans which were procured by means of books on which nothing was due, and on which forgery was necessary for their pretended transfer. They are governed by the same principles as those we have applied in the claim of the Faneuil Hall Bank.

In certain of the remaining claims, while the treasurer did not himself effect the loan, he participated in the fraudulent transaction at the time the loan was made; in others, after the transaction, he recognized the fictitious account that had been used; and in one he had apparently no agency, the fraud being effected by the use of his name by his son, which it is found wherever it was used to have been a forgery by the son. In all cases, the instruments and agencies by which the frauds were effected were forged assignments and fictitious securities, such as we have heretofore considered. They do not require a separate examination to ascertain if in them, or some of them, there are not other reasons why the Reading Savings Bank should not be held liable. They cannot be distinguished in favor of the claimants, certainly, from those already discussed.

Claims disallowed.

FIRST NATIONAL BANK OF EASTON *vs.* CHARLES F. SMITH
& others.

Suffolk. March 16, 1881; March 23. — May 15, 1882. ENDICOTT & FIELD,
JJ., absent.

Two debtors made an assignment of all their property in trust, for the security of new notes to be given by them to such of their creditors as should become parties to the assignment within two months from the date thereof. By the terms of the assignment each creditor was to receive four new notes, payable at different times, the last being payable in thirty months, and covenanted not to sue his original demand except on default in the payment of the new notes. The trustees paid only a dividend on the new notes. After the last of the new notes matured and one debtor had received a discharge in bankruptcy and the other had ceased to be a resident of this Commonwealth, a creditor brought a bill in equity seeking to become a party to the assignment. *Held*, that, although the trustees had funds sufficient to pay him the same dividend which the creditors who signed had received, and although he had accidentally failed to be a party to the assignment, and would have been one had he known of it in time, the bill could not be maintained.

BILL IN EQUITY, filed May 17, 1880, against Charles F. Smith, Caleb H. Warner, Thomas Upham, all of this Commonwealth, and John W. Draper, formerly of this Commonwealth, but now a resident of the State of Texas, alleging that, on August 17, 1875, the Hickory Coal Company made a promissory note for \$5000, payable in four months after date to its own order, which it indorsed, and that the note before its maturity was indorsed by the defendants Upham and Draper, and became the property of the plaintiff; that at its maturity the plaintiff, being the holder thereof for value, duly demanded payment thereof of the Hickory Coal Company, which neglected to pay the same, and due notice of its nonpayment was given to Upham and Draper; that Upham and Draper, prior to February 2, 1876, were indebted to the plaintiff to the amount of said note, the expense of protest and the interest thereon, and that said indebtedness had in no part been paid; that on or about February 2, 1876, Upham and Draper, being unable to pay their debts in full, with the intent of applying all their property for the equal benefit of all their creditors, and in order that all their creditors might eventually be paid in full, entered into an indenture with the defendants Smith and Warner, and with their creditors, whereby Upham and

Draper agreed to give new notes, payable in twelve, eighteen, twenty-four and thirty months, to each of the creditors who should become parties to said indenture within two months, and to pay the indebtedness of such creditors made up as cash of the date of February 15, 1876; that by said indenture they conveyed and assigned all their personal property and assets, as set forth in certain schedules annexed thereto, to Smith and Warner in trust, to receive, manage and dispose of the same, and to divide the proceeds thereof ratably among said creditors; and the creditors covenanted not to sue their original demands, unless default was made in the payment of the new notes at their maturity; that the indenture was duly executed by the four defendants, and Smith and Warner accepted said trust and took possession of the property and assets thereby assigned; that the plaintiff then had, and still has, a right to become a party to the indenture; that certain creditors of Upham and Draper were notified of the execution of the indenture, and were invited to become parties thereto, of whom some accepted and signed the same, and others refused; that the plaintiff was not notified of the indenture, and had no opportunity to become a party thereto, until, as Smith and Warner allege, the time within which a creditor might sign the same had expired; that, in contravention of the intent and terms of the indenture, the defendants wilfully and intentionally withheld notice from the plaintiff of the intended indenture and assignment, in order to deprive the plaintiff of its share of the property thereby assigned; that the plaintiff did not know that the indenture had been made, or that the assignment thereby made was contemplated, until about July 1879; that thereupon the plaintiff applied to Smith and Warner, and asked to be allowed to sign the indenture, and to become a party thereto, on a footing with the other creditors who signed the same; but that Smith and Warner declined to allow the plaintiff to sign, and refused, and have ever since refused, to allow it to sign, or to recognize it as a party to the indenture, and have refused to, and withheld from, the plaintiff all benefit of the assignment; and that by said indenture Upham and Draper assigned and conveyed all their respective property and assets to Smith and Warner, and neither Upham nor Draper had any property, other than that assigned by the indenture, which could be reached by

proceedings at law or in equity, to be applied to the payment of the debt to the plaintiff.

The prayer of the bill was that the defendants might be decreed to allow the plaintiff, as a creditor of the defendants Upham and Draper, to become a party to the indenture, and that thereupon it might be subject to and have the benefit of the provisions thereof, as if it had executed the same simultaneously with the other creditors; that the defendants might be decreed to do such acts and execute such papers as shall be necessary under the terms of the indenture to secure to the plaintiff its equitable share in the proceeds of the property thereby conveyed and assigned; and for further relief.

The bill was taken for confessed as against the defendants Upham and Draper.

The following facts were agreed: All the parties who executed the deed did so within two months of its date. The signatures of the creditors were obtained chiefly by Draper, acting for himself and Upham, with the latter's consent. The trustees did not attempt to procure signatures, nor were they requested by any person to do so; but the trust deed was put into their hands fully executed. The trustees had no knowledge that the plaintiff was a creditor of Upham or Draper until about August 1878. Several creditors of Upham and Draper had no notice of the trust until after the expiration of the two months limited in the deed, and have never become parties thereto; and other creditors were seasonably notified, but declined to become parties. The plaintiff received, and still holds, a promissory note indorsed by Draper and Upham, as alleged in the bill, and it has been duly protested, and the indorsers duly charged. New notes have been received from Draper and Upham by the creditors who are parties to the trust deed, as therein provided. The trustees have received the property assigned to them by Upham by the trust deed, but have received nothing of any value whatever from Draper.

On April 7, 1879, the trustees paid to the creditors who became parties to the deed a partial dividend of seven per cent upon the new notes held by them, and on August 21, 1879, a further dividend of five per cent of such new notes. At the time of the service upon them of the subpoena in this cause, the trustees held in their hands some property still undivided, which is of

uncertain value, and is not sufficient to make more than a partial payment upon the unpaid balance of the new notes already secured by the trust deed; but there is enough in their hands to pay a dividend to the plaintiff equal to what the other creditors who became parties to the trust have received; and, up to the present time, the trust would not have been closed, had this suit not been brought.

On April 26, 1878, Upham filed a petition in bankruptcy in the District Court of the United States for the District of Massachusetts, and on May 21, 1878, was adjudicated a bankrupt. A meeting of his creditors was duly called for June 11, 1878, notice of which was duly mailed to the plaintiff, as required by law, but was never received by the plaintiff. Upham received a discharge in bankruptcy in due form on September 2, 1878. His estate paid no dividend in bankruptcy, and the plaintiff never proved its claim.

The claim of the plaintiff was set forth by Upham in his schedule of unsecured creditors, filed with the petition in bankruptcy; and in his schedule of secured creditors, filed at that time, are given the names of various persons, signers of said trust deed, against whose names are written these words: "These claims are upon notes signed by J. W. Draper, or Hickory Coal Co., of Pottsville, Pa., and acceptances of J. H. Huddell & Co., or Huddell & Seitzinger, of Philadelphia, Penn., all indorsed by me. The claims are secured by property in the hands of Warner and Smith, of Boston, as trustees, conveyed February 2, 1876. The property is far less in value than the claims secured."

It appears by the schedule of unsecured creditors, that, at the time of filing his petition, Upham was indebted to a very large number of creditors, and to a very large amount upon notes of various persons, indorsed by him and maturing prior to February 2, 1876.

Hearing before *Field, J.*, who reserved the case for the consideration of the full court; such decree to be entered as justice might require.

The case was argued in March 1881, by *H. D. Hyde & H. R. Bailey*, for the plaintiff, and by *J. B. Warner*, for the defendants; and reargued in March 1882, by *Hyde & Bailey*, for the plaintiff, and by *Warner, (J. J. Myers with him,)* for the defendants.

DEVENS, J. If we assume, in favor of the plaintiff, that the assignment to trustees was one to the benefit of which any creditor of Upham and Draper was entitled, the question is not, as stated by the plaintiff, whether a creditor, who has not executed a trust assignment within the time specified, can be allowed, under any circumstances, to come and sign after the time has elapsed, he having failed to execute the same because of accident, mistake or want of notice. The assignment to trustees was not an assignment of property simply for the benefit of creditors, of which they were entitled to avail themselves without, upon their own part, subjecting themselves to any obligations. The property in trust was thus placed by an instrument of February 1876, to secure the payment of certain new notes, which were given to those creditors who became parties to the instrument, and who covenanted not to sue their original demands unless default was made in the payment of such new notes at their maturity. This contract operated to give to the debtors a large extension of time, during which it was believed that their property and the profits anticipated therefrom would enable the trustees to pay the new notes. It was, on the part of the debtors, an agreement with certain creditors for an extension of time in the hope of avoiding failure or bankruptcy, and involved on the part of the creditors a substantial concession, as during the period that the new notes were maturing they could not enforce their demands. It is hardly possible to say that the plaintiff would have ever entered into the obligations imposed upon those creditors who became parties to the instrument, had the opportunity of signing been offered to it. It is certain that some who had the opportunity declined.

All those new notes have long since matured, the last becoming due in August 1878. One of the debtors has been discharged in bankruptcy, and the other has ceased to be a resident of this State. In May 1880, the plaintiff filed this bill. New notes such as the agreement contemplates cannot now be given, for the debtor cannot be compelled to assume liabilities from which he has been discharged by bankruptcy. Could this be done, the plaintiff itself cannot give the consideration in the extension of time which the debtors were to receive, and if it were possible, as one of them is in bankruptcy, it would be

useless. During all the period also that intervened between the date of the agreement and the filing of this bill, the plaintiff has preserved every legal right which it had against its debtors. The question properly stated is therefore whether a creditor may have the benefit of a trust assignment, when he cannot deliver the consideration therefor, and has enjoyed all the privileges of which the contract, had he entered upon it within the time specified, would have deprived him. It is a question probably of more importance to the other creditors than to the debtors, whether one who cannot now bear the burden they have borne, and who has enjoyed rights antagonistic to theirs, may now claim a portion of the trust property.

That conveyances by a debtor may be made to creditors by way of preference, or that they may be made to trustees for the benefit of creditors assenting thereto, and that such conveyances are valid, except when repugnant to the provisions of the insolvent or bankrupt laws, will not be controverted. *National Mechanics' & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38.

Where a time is specified in such a deed within which a creditor must become a party in order to avail himself of its benefits, the English courts have apparently been more indulgent than those of this Commonwealth in treating the time as not of the essence of the contract, and in permitting creditors to accede to or to execute the deed after the time limited has elapsed. *Phenix Bank v. Sullivan*, 9 Pick. 410. *Battles v. Fobes*, 21 Pick. 239. *Dedham Bank v. Richards*, 2 Met. 105. *Whitmore v. Turquand*, 1 Johns. & Hem. 444; *S. C.* 3 DeG., F. & J. 107. *In re Baber's trusts*, L. R. 10 Eq. 554. *Biron v. Mount*, 24 Beav. 642.

We have no occasion to compare these cases, or to consider whether the law in this Commonwealth has been held too strictly to the words in such an instrument by which time is limited. We certainly do not intend to intimate that it has. But the present case has the important element that the deed contemplated that the creditor would assume important obligations which would be for the benefit of the debtors, and also for the benefit of the other assenting creditors, as the arrangement made by it could not then be disturbed by any action of his. The English cases recognize that where a deed is a trust for the

benefit of such creditors as shall come in and become liable to the obligations entered into on the part of the creditors executing it, and when in order to become *cestuis que trust* they must do this, they cannot become such until they are bound by the covenants contained therein. If they cannot put themselves in the situation to give the consideration contracted for, they cannot entitle themselves to the benefit of the deed. *Biron v. Mount, ubi supra. Whitmore v. Turquand, ubi supra. Field v. Donoughmore, 1 Dr. & War. 227. Forbes v. Limond, 4 DeG., M. & G. 298.*

If it be true that the plaintiff accidentally failed to make this contract, or would have made it if notified of its right so to do, the fact still remains that it cannot give the required consideration for the contract, and that it has enjoyed rights it would not have possessed had it become a party to the contract.

Bill dismissed.

ORLANDO TOMPKINS & another vs. THOMAS E. HALLECK.

Suffolk. January 27. — May 15, 1882.

The representation of a dramatic work, which the proprietor has never caused to be printed and has not obtained a copyright of, if made without license of the proprietor, is a violation of his right, and may be restrained by injunction, although such representation is from a copy obtained by a spectator attending a public representation by the proprietor for money, and afterwards writing it from memory.

DEVENS, J. This is a bill in equity to restrain the defendant from representing at his theatre in Boston a drama called "The World," and for further relief.

It appears from the report of the judge who heard the case that this drama was originally composed in England, where, after being presented, it was sold to one Colville in New York, who caused it to be altered and amended, to suit the presumed taste of an American audience, by one Stevenson. It was successfully represented at Wallack's Theatre in New York, and was then assigned to the plaintiffs, with the exclusive right to represent the same in the New England States. The drama does not

appear ever to have been copyrighted or printed. While represented at Wallack's Theatre, one Byron and one Mora attended the representation, on three or more occasions, with the intent of copying and reproducing the drama as there enacted. Byron committed as much of the play as he could to memory, and, after each performance, dictated it to Mora until the copy was completed. It was not shown that either took any notes or written memoranda in the theatre. Byron subsequently made an agreement with the defendant to produce the same; and, against the remonstrance of the plaintiffs, who informed him of their ownership, it was advertised and produced by the defendant at his theatre, known as the Alhambra. As produced by the defendant it was called "The World," and is found to be in all substantial particulars identical with the plaintiffs' drama of the same name.

It being found by the judge who heard the cause that the dialogue and incidents of the drama were acquired by memory by Byron, who visited Wallack's Theatre sufficiently often for that purpose, that no written or stenographic minutes were made either by him or Mora in the theatre, and that there was no violation of any trust or confidence reposed in them by the plaintiffs or their assignors, he ruled that no injunction could issue; but, at the request of the plaintiffs, reported the case for the consideration of the full court. If the ruling is sustained, the bill is to be dismissed; otherwise, an injunction is to issue, and the case to be referred to a master for the assessment of damages.

These facts bring the case clearly within the principles decided in *Keene v. Kimball*, 16 Gray, 545; and it is frankly admitted by the counsel for the plaintiffs that, unless that decision shall be reconsidered and reversed, no injunction can issue according to the prayer of the bill. The question decided in *Keene v. Kimball* had never until then been directly determined in any reported case. It had been discussed with great ability by Judge Cadwalader in the Circuit Court of the United States for the Eastern District of Pennsylvania, where a decision of it was not necessary in order to dispose of the case before him. *Keene v. Wheatley*, 9 Am. Law Reg. 33. Adopting the views there expressed, it was held in *Keene v. Kimball* "that the literary

proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its being retained in the memory of any of the audience." The case of *Keene v. Kimball* has not since been reaffirmed here, nor, so far as we are aware, elsewhere, nor has it been distinctly denied by the decision of any adjudicated case, except that of *French v. Conelly*, decided by the Superior Court of New York, which is not the final tribunal in that State. 1 N. Y. Weekly Dig. 196. The defendants were there charged with representing an unprinted play, "Around the World in Eighty Days," in violation of the rights of the plaintiff. They sought to maintain a defence upon the ground that they had themselves dramatized the story from Jules Verne's work of the same name. They were unsuccessful in this, and, it having been proved that the copy used by them was obtained by the memory of individuals after witnessing its public representation, an injunction was issued restraining the defendants from further representing it.

An examination will show various and conflicting opinions expressed by jurists, as well as by text-writers of high respectability, upon the question involved. *Keene v. Clarke*, 5 Rob. (N. Y.) 38. *Palmer v. De Witt*, 2 Sweeny, 530; 7 Rob. (N. Y.) 530; 36 How. Pr. 222; and 47 N. Y. 532. *Crowe v. Aiken*, 2 Biss. 208. *Shook v. Rankin*, 6 Biss. 477. *Boucicault v. Fox*, 5 Blatchf. C. C. 87. Drone on Copyright, 558-564.

In view of this contrariety of opinion, it is not an unreasonable request on the part of the plaintiffs that the question involved should be re-examined, in order that the court may consider whether the decision in *Keene v. Kimball* expresses correctly the rights of parties, and gives to the proprietors of unpublished plays the full protection to which they are entitled.

The St. of 8 Anne, c. 19, which is the foundation of the English copyright law, while it included plays and dramatic compositions, protected the author in his exclusive right to publish in print, but not in that of public representation of his work. It has since been modified by the St. 3 & 4 Will. IV. c. 15, and subsequently by that of 5 & 6 Vict. c. 45. The U. S. St. of February

3, 1831, was similar in this respect to the original English law, and, like it, has been so changed by the U. S. St. of August 18, 1856, that protection in the exclusive representation is now afforded where the play is published in print. It is perhaps somewhat remarkable that protection in the right of exclusive representation was not afforded by the St. of 8 Anne, c. 19, which is said in *D'Almaine v. Boosey*, 1 Y. & C. Ex. 288, by Lord Lyndhurst, to have been one of the most laboriously considered acts ever passed by the British Parliament. Although the result of the petitions of the English booksellers, it was submitted to, and carefully examined and passed upon by, committees of which many distinguished literary men were members. When it is remembered that among these were such dramatic writers as Addison and Steele, it would seem that this right would have been carefully guarded.

Dramatic compositions differ from other literary productions not intended for oral delivery in this, that they have two distinct values, each worthy of protection; — that which they have as books or publications for the reader, and that which they have by reason of their capacity for scenic representation. They are works, in prose or poetry, in which stories are told or characters represented both by conversation and action. Some are poems cast in a dramatic form, capable of representation upon the scene rather than adapted to it, and whose most valuable characteristic is their purely literary merit. Others, of but slight literary pretensions, and affording but little satisfaction in the perusal, are found agreeable in representation from the spirited development of the story which is told in action, the vivacity and interest of the events displayed, even if the conversations of the imaginary characters, out of this connection, would appear tame and unattractive. The most perfect are those which, like some of the tragedies of Shakespeare, as *Hamlet* or *Macbeth*, are adapted alike to the library and the stage, and which address themselves more agreeably to those who read or those who hear, as such persons themselves differ in their respective capacities for enjoyment.

That the right of property which an author has in his works continues until by publication a right to their use has been conferred upon or dedicated to the public, has never been disputed.

If such publication be made in print of a work of which no copyright has been obtained, it is a complete dedication thereof for all purposes to the public. *Wheaton v. Peters*, 8 Pet. 591. *Stevens v. Gladding*, 17 How. 447. If of a work of which a copyright has been obtained, it is so dedicated, subject to the protection afforded by the laws of copyright, the author accepting the statutory rights thereby given in place of his common-law rights. But the representation of an unprinted work upon the stage is not a publication which will deprive the author or his assignee of his rights of property therein. *Roberts v. Myers*, U. S. C. C. Mass. Dist. 23 Law Rep. 396. It will not interfere with his claim to obtain a copyright therefor. *Keene v. Kimball*, *ubi supra*. Nor will it deprive him of his power to prevent a publication in print thereof by another. *Macklin v. Richardson*, Ambl. 694.

Nor can we perceive why it should deprive him of his right to restrain the public representation thereof by another. It is said, indeed, in *Keene v. Kimball*, that the court is not aware of any case then existing, either in England or America, "in which the representation of a play has been restrained by injunction, where no copyright had been acquired, and where the proprietor had permitted its public representation for money, except the case of *Morris v. Kelly*, 1 Jac. & Walk. 481," the authority of which is doubted, it being deemed impossible to reconcile it with the earlier case of *Coleman v. Wathen*, 5 T. R. 245, or with the subsequent decision in *Murray v. Elliston*, 5 B. & Ald. 657. This statement, taken in connection with the general terms in which the conclusion of the court is expressed, at the end of the opinion, — "that the representation by the defendant of a dramatic work, of which the proprietor has no copyright, and which she had previously caused to be publicly represented and exhibited for money, is no violation of any right of property, although done without license from such proprietor, and, as it does not appear to have been done in violation of any contract or trust, cannot be restrained by injunction," — would indicate that, in the view of the court, even if a copy were obtained, either by notes, writing or stenography, although the copy was in fact obtained in the case then adjudicated by means of memory alone, there might properly be a subsequent public representation by the

possessor of such a copy. In this view, public representation is treated as a complete dedication of such a work for that purpose to all who can obtain in any way, from the representation itself, a copy thereof.

The case of *Coleman v. Wathen, ubi supra*, was an action brought, by the owner of the copyright of O'Keefe's farce called "The Agreeable Surprise," against the manager of a theatre in Richmond, on account of its performance, for the penalty imposed by the St. of 8 Anne, c. 19, as for an unauthorized publication. The verdict having been in his favor, it was set aside upon the ground that the only publication by which the statutory penalty could be incurred was a publication in print. It was argued by Mr. Erskine, for the plaintiff, that, independently of the statute, there was a common-law right, by which the author had an exclusive property in his works; but it is obvious that this portion of his argument had little relevancy in an action for a penalty imposed by statute. The case was heard in 1793, before Lord Kenyon and Mr. Justice Buller, and may be dismissed as having no bearing upon an inquiry as to the rights of a person to be protected against the unauthorized representation of a play of which no copyright has been obtained.

The case of *Morris v. Kelly, ubi supra*, was that of a bill filed in 1820 by the proprietor of another farce of O'Keefe for an injunction to prevent its performance at a rival theatre. The play was one which had been long performed and had been copyrighted, but had never been printed by authority of the author or proprietor, or otherwise published than by representation. An injunction was granted by Lord Eldon. The report of the case is very brief, and no opinion of the Lord Chancellor is preserved, which is much to be regretted, as his discussion of the question involved would have been of value.

In 1822, Mr. Murray, the publisher and owner of the copyright of Lord Byron's tragedy of "Marino Faliero," who had printed and published it for sale, applied for an injunction to restrain Mr. Elliston, the manager of Drury Lane Theatre, from representing it in an abridged form on the stage of that theatre. The injunction was granted by Lord Eldon, who sent to the King's Bench the question whether the plaintiff could, under such circumstances, maintain an action against the defendant for

publicly representing the tragedy thus abridged; and that court certified its opinion in the negative. *Murray v. Elliston*, *ubi supra*. As no opinion was delivered, it is impossible to ascertain upon what ground the decision of the Court of King's Bench was placed. It may have been upon the ground that the abridgment was a fair one, and that thus no invasion of the author's rights had been committed, the English law being extremely liberal to one who abridges the work of another. It may have been upon the ground that, as there had been a publication in print, there was no redress for an unauthorized theatrical representation, or upon the ground that there was no such redress in any case where the party had copyrighted his play, as he then accepted the protection which the statute afforded, in lieu of any which he might have at common law. If decided upon the latter ground, the case is not reconcilable with that of *Morris v. Kelly*, and this for the reason that, meagre as the report is, it clearly appears upon examination that the play which was there the subject of controversy was one of which a copyright had been obtained. Were it otherwise, the cases could well stand together.

"After the decision of *Murray v. Elliston*, 5 B. & Ald. 657," says Lord Denman in *Russell v. Smith*, 12 Q. B. 236, "it seems to have been considered that publication to an audience was not within the provision of the acts relating to copyright: consequently St. 3 & 4 Wm. IV. c. 15, was passed, and, in respect to dramatic literary property, gave to authors the profits arising from publication by representing the piece on the stage."

These three cases, relating to plays in which copyrights existed, and the rights to representation which proprietors possess in such plays, have but little bearing upon the inquiry whether the owner of a play which is unprinted, and of which he has no copyright, who has exhibited it for money, may be protected from public representation thereof by another.

The case of *Macklin v. Richardson*, Amb. 694, decided in 1770, is of much more importance in this connection. The plaintiff was the author of a farce called "Love à la Mode," which had never been printed or copyrighted. It had been performed under his direction, and also by his authority, for which he received compensation. Great care was taken by him of the manuscript, which was always kept in his own possession.

The defendants, who were proprietors of a journal, employed a stenographer, who took down the words of the play, and his copy as written out was afterwards corrected by one of the proprietors of the journal, who published one act in their journal, and advertised the publication of the remainder in their next number. Upon application to the Lord Chancellor, an injunction forbidding such publication was issued, which was afterwards continued until the final hearing. When the case came on for final hearing, the Great Seal was in commission, and the injunction was made perpetual by the Lords Commissioners. "It can scarcely be necessary," to use the words of Judge Cadwalader in *Keene v. Wheatley*, "to refer to *Morris v. Kelly*, or any other case, to show that, on the principle of this decree, the performance of *Love à la Mode* at another theatre, from the short-hand writer's report, would also have been prevented by an injunction."

Postponing for a moment the question as to what is unlawfully obtaining a copy of a play which has not been copyrighted, and which has been exhibited for money, and whether there is a distinction between the representation from a copy obtained by memory and from one obtained by stenography or similar means, the proposition that the representation of such a play, the copy of which has been unlawfully obtained, will be restrained by injunction, is certainly supported by much authority since the case of *Keene v. Kimball* was decided, nor has it been controverted by the adjudication of any case. *Boucicault v. Fox*, *ubi supra*. *Shook v. Daly*, 49 How. Pr. 366. *French v. Maguire*, 55 How. Pr. 471. *Shook v. Rankin*, *ubi supra*. *Crowe v. Aiken*, *ubi supra*. *Palmer v. De Witt*, *ubi supra*. *Boucicault v. Wood*, 2 Biss. 34.

In *Crowe v. Aiken*, *ubi supra*, it was held that the author's rights in a manuscript play, of which no copyright had been obtained, were in no manner affected or limited by the acts of Congress as to copyright, and that, although previously performed, an injunction against an unauthorized performance would be granted. In giving the opinion of the court, Judge Drummond remarks, "I am also of opinion that, as the law now exists in this country, the mere representation of a play does not of itself dedicate it to the public, except, possibly, so far as those

who witness its performance can recollect it, and that the spectators have not the right to secure its reproduction by phonographic or other verbatim report, independent of memory." The play in question was one written by Taylor, and known as "Mary Warner." As, upon the evidence, it was found as a fact by the court that the copy was obtained by a short-hand reporter, it did not there become necessary to consider whether that which is stated as a possible exception actually was one.

In *Keene v. Kimball*, it is said that it is not intended "to intimate that there is any right to report, phonographically or otherwise, a lecture or other written discourse, which its author delivers before a public audience, and which he desires again to use in like manner for his own profit, and to publish it without his consent, or to make any use of a copy thus obtained." But no distinction can be made between works cast in the dramatic form and other literary productions intended for public delivery to those who pay a suitable compensation for the amusement or instruction they expect to obtain. The right to be protected against the unauthorized representation of a dramatic work is in principle the same as the right to be protected against the unauthorized oral delivery of a public lecture. An ingenious argument was indeed made in *Keene v. Kimball*, derived from the principles and ideas of the Puritan founders of the Commonwealth, that a dramatic composition was not equally under the protection of the law with other literary works; but it was held by the court to be quite clearly otherwise.

The late Mr. Charles Dickens was an accomplished public reader of selections from his own works. If he had selected a story which had never been published or copyrighted, according to the suggestion above quoted from *Keene v. Kimball*, there would have been no right on the part of an auditor to report it, phonographically or otherwise, so as to avail himself of the copy by a subsequent oral delivery by himself or another to whom he might transfer it. The genius of Mr. Dickens was essentially dramatic; if he had seen fit to prepare and read himself, as he might have done, a drama, representing its various characters, such a literary production would not have been any less protected than a written discourse or lecture. Nor can it be perceived that, if, instead of

reading such a drama himself, he had permitted it to be represented on the stage, which is but a reading by several persons instead of one, accompanied by music, scenery, and the usual accessories of the stage, his rights as an author to protection would be in any way diminished. *Boucicault v. Fox, ubi supra.*

The decision in *Keene v. Kimball* must be sustained, if at all, upon the ground that there is a distinction between the use of a copy of a manuscript play obtained by means of the memory or combined memories of those who may attend the play as spectators, it having been publicly represented for money, and of one obtained by notes, stenography, or similar means, by persons attending the representation;—that in the former case the unauthorized representation of the play would be legal, while in the latter it would not be.

The case of *Keene v. Kimball* involved a controversy as to the right to represent the same play, the right of representing which was involved in *Keene v. Wheatley, ubi supra.* It was "The American Cousin;" to use the language of the answer in *Keene v. Wheatley*, "a piece presenting, in suitable situations, those eccentricities usually attributed on the stage to Yankees;" and appears to have had much success, both on this account, and as presenting those absurdities usually attributed on the stage to the exquisite or dandy. In *Keene v. Wheatley*, the controversy was as to the title to the play as a literary production, as it then existed, it having been in some parts curtailed, and having also received certain additions, both written and unwritten, and also as to the mode in which the defendant obtained it. It was deemed to be proved that the play in its existing form was the property of the plaintiff, and that the defendants had obtained their acting copy from her by a breach of confidence on the part of an actor employed by the plaintiff, who had communicated it to the defendants; and that the plaintiff was therefore entitled to an injunction.

The opinion of the Circuit Court, as delivered by Judge Cadwalader, is a very elaborate discussion of the whole subject of literary property, and embraces many questions not involved in the judgment of the case. Among these is included the question, whether a public representation will authorize another, who may obtain a copy by memory, to afterwards

represent the play so performed. The theory advanced by him, which was apparently original, and in support of which he cites no adjudicated case, is that the act of public performance of a play is a general publication; and that, "when a literary proprietor has made a general publication in any of the modes which have been described, other persons acquire unlimited rights of republishing in any modes in which his publication may directly or secondarily enable them to republish." If this be correct to the full extent of the proposition, the manner in which a copy is obtained for other representations must be unimportant, as the right to subsequently represent is made to rest upon the fact that there has been a public representation. But in order that the play shall be thus represented, he contends that a copy must be obtained by "fair means." Those which he defines as "fair means" are the impressions on the memory of some persons whose constant attendance at the performance of the play may enable them to write or repeat elsewhere that which they have heard; but he holds that no one may lawfully make use, for this purpose, of stenography, writing or notes. According to the facts as they were proved in *Keene v. Kimball*, by the allegations of the bill and the admission of the demurrer, the copy there used for representation was obtained solely by memory.

Judge Cadwalader further remarks, "that the manager of a theatre may prevent a reporter from noting the words of such a play phonographically or stenographically, or otherwise. As one of the audience, he would, in doing so, transgress the privileges conceded in his admission. But the privileges of listening and of retention in the memory cannot be restrained. Where the audience is not a select one, these privileges cannot be limited in either their immediate or ulterior consequences." The effect of this argument is, that as the privilege of listening is conceded, and as memory cannot be restrained, any use of memory would be legitimate; and that a spectator, either alone or acting in concert with others, if able to carry away in memory the contents of a play, acquires a lawful right to make any use of the play he chooses, however destructive to the literary property of its author.

Adopting the views of Judge Cadwalader, it is said in *Keene v. Kimball*, that, "if persons, by frequent attendance at her"

(the plaintiff's) "theatre, have committed to memory any part or the whole of the play, they have a right to repeat what they heard to others." The repetition thus contemplated as rightful, as shown by the sentence heretofore quoted from the same opinion, is by public representation of the play so committed to memory. It is added, "We know of no right of property in gestures, tones, or scenery, which would forbid such reproduction of them by the spectators as their powers of imitation might enable them to accomplish."

The theory that the lawful right to represent a play may be acquired through the exercise of the memory, but not through the use of stenography, writing or notes, is entirely unsatisfactory. "The public," it is true, as is said in *Keene v. Kimball*, "acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made of it to the public." But the question is as to the extent of that dedication. It is not easy to understand why the author, by admitting the public to the performance of his manuscript play, any more concedes to them the right to exercise their memory in getting possession of his play for the purpose of subsequent representation, than he does the privilege of using writing or stenography for that purpose. Drone on Copyright, 568, 569. The spectator of a play is entitled to all the enjoyment he can derive from its exhibition. He may make it afterwards the subject of conversation, of agreeable recollection, or of just criticism, but we cannot perceive that in paying for his ticket of admission he has paid for any right to reproduce it. The mode in which the literary property of another is taken possession of, cannot be important. The rights of the author cannot be made to depend merely on his capacity to enforce them, or those of the spectator on his ability to assert them. One may abandon his property, or may dedicate it to the use of the public; but while it remains his, the fact that another is able to get possession of it in no way affects his rights.

If the performance of a manuscript play is not a complete dedication to the public, (and from the time of the decision in *Macklin v. Richardson*, *ubi supra*, there is no case known to us which has so held,) subsequent performances by others, whether they obtain their copies by memory or by stenography,

are alike injurious. Cases are not unknown of memories so tenacious that their possessors could, by attending one or two representations, retain the text of an entire play; and the dramatic profession is one in which the faculty of memory is highly cultivated. There is no reason why the exercise of this faculty should be in any way restrained: it is not that the spectator learns the whole play which entitles the author to object; it is the use that is sought to be made of that which is learned that affords just ground of complaint. "Such use," as remarked by Judge Monell, "is as much an infringement of the author's common-law right of property, as if his manuscript had been feloniously taken from his possession." *Palmer v. De Witt*, 2 Sweeny, 558.

Following the decision in *Keene v. Kimball*, the judge who presided at the trial of the case before us held that, although the copy of the drama called "The World" was obtained by the memory of persons who formed part of the audience, who attended the performance for the purpose, who wrote out a manuscript, comparing their recollections, and testing them by subsequent visits to the performance, as no violation of trust or confidence was shown, no injunction could be granted. But the acts done by these persons, like those proved in *Keene v. Kimball*, were, as we view them, in a legal sense violations of contract and confidence. The author had a right to believe that, in purchasing their tickets of admission, these persons did so for the pleasure or instruction that the performance of his drama would afford, and that they did not do so in order to invade his privilege of representation, which, as it was of value, he must have desired to preserve.

The lectures of an accomplished medical professor are of high pecuniary value. They are repeated from year to year before different classes, with only such changes as advancing science may require, or such new illustrations as experience may dictate. The student is not only permitted, but invited, to take written notes. He is entitled to all the instruction he can obtain from the lectures, using both notes and memory to retain it; he may employ the information he has derived in his practice; he may reproduce it in his own discourses, with such other information as his education or experience may give him, should he desire

himself to discuss a similar subject; but he cannot therefore orally deliver or publish in print the lecture of which he has been an auditor.

Where persons are admitted, as pupils or otherwise, to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or take away the exclusive right of the lecturer in his own lectures, whether that be to publication in print or oral delivery. *Abernethy v. Hutchinson*, 3 L. J. Ch. 209, was a bill brought by the celebrated surgeon Abernethy to restrain the defendants from publishing his lectures. It was held by Lord Eldon, that, while those pupils who were rightfully admitted to the lectures might take them down for their own information, they could not publish them for profit, or sell them to others to publish. *Bartlette v. Crittenden*, 4 McLean, 300, goes even further. It was there held that an author did not dedicate his manuscript to the public by using it to instruct others; and that, even if he permitted his pupils to take complete copies, they could not use such copies for publication. In these cases, there was nothing wrongful in obtaining or keeping possession of the copies which had been permitted; it was the use sought to be made of them that was restrained. The implied contract of the author of a play, which is not printed or copyrighted, with the spectator, is closely analogous to that of the lecturer with his pupil. It is a violation of contract and confidence when the spectator, obtaining possession of a copy of the drama, whether by memory, notes or stenography, undertakes to use it for publication in print, or for another public representation. 2 Story Eq. Jur. §§ 949, 950.

The special use of his play made by the author, for his own advantage, by a representation thereof for money, is not an abandonment of his property nor a complete dedication of it to the public, but is entirely consistent with an exclusive right to control such representation. *Roberts v. Myers*, *ubi supra*. If the spectator desires, there is no reason why he should not be permitted to take notes for any fair purpose; as, if he is a dramatic critic, for fair comment on the production, which is offered to the favorable consideration of the public; or, if a student of dramatic literature, for comparison with other works of its class. We should not be willing to admit that police arrangements

could be allowed to interfere with this, any more than with the taking of notes by one who attends a course of scientific lectures. The taking of notes in order to obtain a copy for representation is a different matter; it is the use intended to be made that renders it proper to restrain such an act. The ticket of admission is a license to witness the play, but it cannot be treated as a license to the spectator to represent the drama if he can by memory recollect it, while it is not a license so to do if the copy is obtained by notes or stenography. In whatever mode the copy is obtained, it is the use of it for representation which operates to deprive the author of his rights.

For the reasons stated, we are brought to the result that the decision in *Keene v. Kimball* cannot be sustained. The presiding judge having, at the hearing of this case, ruled in accordance with it, his decree must be reversed.

The plaintiffs are entitled to a decree restraining the defendant from exhibiting the play called "The World," and referring the case to a master to assess the damages sustained by them by reason of its unauthorized exhibition by the defendant.

Decree reversed.

S. J. Thomas, for the plaintiffs.

D. F. Fitz, for the defendant.

SARAH W. COCHRAN *vs.* SAMUEL L. THORNDIKE & others,
trustees.

Suffolk. March 24. — May 15, 1882. ENDICOTT & FIELD, JJ., absent.

The St. of 1861, c. 164, provides that a widow may waive the provisions made for her in her husband's will, and shall in such case be entitled to such portion of his real and personal estate, (with certain limitations as to the personal estate,) as she would have been entitled to if her husband had died intestate. The St. of 1880, c. 211, provides that "whenever any person shall die intestate, without leaving issue living, and shall leave a husband or wife surviving, such husband or wife shall take in fee the real estate of such deceased to an amount not exceeding five thousand dollars in value." *Held*, that the widow of a man dying, after the passage of the latter statute, testate, and without leaving issue living, is entitled, on waiving the provisions of her husband's will, to the benefit conferred by this statute.

PETITION to the Probate Court by the widow of Samuel Q. Cochran, who died testate on March 21, 1881, leaving no issue living, alleging that, having waived the provisions of her husband's will, she was, under the St. of 1880, c. 211, entitled in fee to real estate of her husband to the amount of \$5000, and praying that it might be assigned and set off to her by metes and bounds. The judge of probate appointed commissioners to set off to the petitioner real estate of her husband in accordance with the prayer of the petition; and the respondents appealed to this court.

Hearing before *Endicott, J.*, who ordered a decree to be entered reversing the decree of the Probate Court. The petitioner appealed to the full court.

H. G. Parker, for the petitioner.

F. Dabney, for the respondents.

DEVENS, J. The petitioner, whose husband has died leaving no issue, has waived the provisions of the will in her favor under the St. of 1861, c. 164, and now claims real estate in fee to the value of \$5000 by virtue of the St. of 1880, c. 211. The question presented is whether she is entitled to any greater portion of her husband's estate than she would be entitled to under the statutes, regulating the descent and distribution of intestate estates, which existed and were in force at the time the St. of 1861 was enacted.

Before the St. of 1861, c. 164, it had long been the law of this Commonwealth that a widow might waive the provisions of her husband's will in her favor, and thus entitle herself to such portion of the estate real or personal as she would have received if her husband had died intestate. Sts. 1783, c. 24, § 8; 1833, c. 40; 1854, c. 428. Gen. Sts. c. 92, § 24. At the time of its passage, the widow, there being no issue, was entitled to a life interest in one half the real estate, and one half the personal property absolutely. Gen. Sts. c. 90, § 15; c. 94, § 16.

The St. of 1861, c. 164, entitled the widow, on waiver of the will, to "such portion of his real and personal estate as she would have been entitled to if her husband had died intestate;" but it provided that she should only receive ten thousand dollars absolutely, with a life interest only in the excess. Its effect was, therefore, in those cases where the half of the personal

property amounted to more than ten thousand dollars, to give to the widow less where she waived the provisions of a will than she would have received had her husband actually died intestate.

It is upon this that the respondents found their argument that, inasmuch as a distinction is made in the St. of 1861 between the right of the widow in cases of actual intestacy and her rights where she has waived the will, or what they term constructive intestacy, it must be deemed, since the St. of 1880, c. 211, — which enacts that, “whenever any person shall die intestate, without leaving issue living, and shall leave a husband or wife surviving, such husband or wife shall take in fee the real estate of such deceased to an amount not exceeding five thousand dollars in value,” — that it has no application except when the husband actually dies intestate; and that the widow cannot entitle herself to its benefits by the waiver of the provisions of a will made in her favor. This argument is not tenable. The St. of 1861 is a general one, and in pursuance of a policy which is found in the legislation of the Commonwealth for many years, that a widow shall receive, by waiver of the provisions of a will, substantially all that she would receive if her husband died intestate. Because there is a modification of this in that statute, so far as the personal property is concerned, we are not to infer other modifications when by legislation the share of the widow is enlarged. The fixing in the St. of 1861 of the amount to which the widow would be entitled by reference to that which she would have received “if her husband had died intestate,” refers her rights to the law regulating the descent and distribution of intestate estates as such law may exist at the time of the husband’s decease. *Brigham v. Maynard*, 9 Gray, 81. Had the St. of 1880 operated to reduce the share which a widow would be entitled to receive where her husband died intestate, it certainly would not be contended that her rights upon her waiver of the will were to be determined by reference to the law as it existed when the St. of 1861 was passed. In fact, the St. of 1880 gives to the widow of one dying childless and intestate an estate which she would not have taken before its passage, and thus increases her share; but, there being no inconsistency between it and the St. of 1861, these

statutes are to be construed each in the light of the other, as coëxistent laws. Thus construed, the rights of the widow by virtue of the effect given to her waiver by the St. of 1861 are determined by the law as it has existed since the passage of the St. of 1880.

Decree of Probate Court affirmed.

GEORGE SAMPSON & others *vs.* SECURITY INSURANCE
COMPANY.

Suffolk. March 10. — May 16, 1882.

Insurance against fire was effected on goods contained in the chambers of A. in brick, stone and iron building No. 117 Franklin Street. A. was the proprietor of a printing establishment and occupied chambers in buildings owned by four different persons, all of which fronted on Federal Street. The entrance to the upper stories of one of them was at 117 Franklin Street, and the other three had entrances to their upper stories on Federal Street. The one having its entrance on Franklin Street and the two others adjoining were built at the same time, and were known as the Franklin Buildings. There were party-walls between them. The fourth building was put up soon after, with distinct walls and with floors at a different level, and was known as the M. Building. Doors were cut through the walls of all the buildings, so that A.'s chambers were connected with each other, and the public entrance to all of them was at 117 Franklin Street, though they were accessible by the staircases leading from Federal Street. At the time of a loss by fire, some of the goods destroyed were in one of the Franklin Buildings, the entrance to the staircase of which was on Federal Street; and other goods destroyed were in the M. Building. *Held*, that the former were covered by the insurance, and that the latter were not.

CONTRACT on a policy of insurance against loss by fire "on type and other printing materials, paper and sheets in process of printing, and printed and manuscript copy of their various directories and other publications, contained in the chambers of Rand, Avery and Company, in stone, brick and iron building No. 117 Franklin Street, Boston." Trial in the Superior Court, before Colburn, J., who reported the case for the determination of this court, in substance as follows:

The execution of the policy, and a loss by fire of like goods greater in amount than the sum named therein, was admitted; and the sole question was, whether the loss, which it was

admitted the plaintiffs had sustained, was covered by the descriptive terms of this policy.

It appeared that, shortly after the great fire in Boston, the owner of the lot of land on the corner of Franklin Street and Federal Street, shown on a plan, a sketch of which is printed in the margin,* and marked John Ritchie, together with the owner of the next lot, marked John Ritchie 2d and Eliza Lewis, and the owner of the next lot, marked John Starrett, constructed buildings upon their several lots, which were erected contemporaneously and under the plans and designs of one architect, presenting in the front on Federal Street the appearance of one entire structure. These buildings were called the Franklin Buildings; and were of stone, brick and iron.

The building on each of said lots was separated from the others by a brick party-wall, and each had separate entrances from the street, and separate stairways to the chambers above the store upon the first story. The John Ritchie building had entrances at Nos. 117, 119, 123, 131 Franklin Street, and 63 and 67 Federal Street; the John Ritchie 2d and Eliza Lewis building, at 69 Federal Street; and the John Starrett building, at 73 and 75 Federal Street. Entrance No. 117 Franklin Street was a stairway leading to the stories above.

About the same time, the owners of the lot of land next adjoining southerly the last-named building on Federal Street improved their lot by the erection of a building differing in plan and appearance in front on Federal Street; and the latter building was not completed until two or three months after the

* Federal Street.

Franklin Street.	John Ritchie	John Ritchie 2d and Eliza Lewis.	John Star- rett.	Miller Building.
117				

Franklin Buildings were finished, and was called the Miller Building. The construction of this building was separate and under a different architect.

The walls of the building marked John Starrett, and those of that marked Miller, were built up solid, and afterwards a single opening was cut through the same at the fifth story only. This opening was closed by doors of iron on each side, which were kept closed and bolted at night. The access from the chamber on the fifth story of the Miller Building through this opening was by a descending incline, upon which trucks were run from that building to and fro to the other building. The Miller Building was numbered 91 and 93 on Federal Street.

Rand, Avery and Company, who are proprietors of a large printing establishment, had, before the completion of these buildings, contracted for leases of the different buildings constituting the Franklin Buildings, and before its completion also took a lease of all that part of the Miller Building which was above the lower story; and all the premises leased by them were so constructed in building as to be adapted to their uses in the portions occupied by them. In the building which is marked John Ritchie, Rand, Avery and Company occupied a counting-room up one flight of stairs, and other chambers above, in addition to the chambers in the fifth story thereof. Rand, Avery and Company occupied all the chambers of the fifth story in each of the three buildings known as the Franklin Buildings, and they also occupied the front part of the fifth story of the building called the Miller Building.

These chambers were a continuous series of connecting rooms, with a single opening in each partition-wall between the several buildings, closed at night by double iron doors, through and from one to the other of which chambers the work done by the firm for the plaintiffs, who were publishers of directories, passed and repassed in various stages of printing, pressing, &c., preparatory to binding, which was done below in a bindery in the Miller Building, or in one on the floor below in buildings Nos. 69 and 73 Federal Street respectively; and, after the sheets were printed and pressed, they were carried into the fifth story of the Miller Building. At the time of this fire, in December 1879, all the insured property was in the Miller Building, except two

and one half reams of paper, of the value of five dollars, which was in the fifth story of one of the two buildings between the John Ritchie building and the Miller Building.

The public entrance to the counting-room, and to all the chambers of Rand, Avery and Company, was through the door numbered 117 Franklin Street, being the most westerly number on Franklin Street; but there was access to the chambers of Rand, Avery and Company in each building by a staircase on Federal Street.

Egress and ingress could be had from and to the chambers on the fifth story of the Miller Building through a staircase at No. 93 Federal Street, which was used by Rand, Avery and Company's other tenants in the rear part of the fifth story; but the door leading to this staircase from Rand, Avery and Company's chambers in the Miller Building was kept locked, and its use as a means of communication with the street was forbidden by the firm, except in case of fire, and when necessary to go to other rooms having business relations with said firm as binderies. Access to their chambers on the fifth story of the John Ritchie building was also possible through a staircase at 67 Federal Street, and also from the John Starrett building by one at 73 Federal Street; but these staircases were not in public and general use as entrances to Rand, Avery and Company's chambers.

Both the staircases at No. 93 Federal Street and 73 Federal Street were used as a means of communication with the bindery of Messrs. Crowell and Company in the Miller Building below, and the bindery of Messrs. Sanborn and Company in the buildings Nos. 69 and 73 Federal Street, to which not infrequently the printed sheets of books printed by Rand, Avery and Company were transferred to be bound; and it appeared that this was substantially the only use made by Rand, Avery and Company, or persons employed by or dealing with them, of these staircases.

The floors of the Miller Building were not on a level with the corresponding stories of the connecting building. The difference in the fifth story was from two to three feet, and the entrance from one building to the other through the opening in the partition-wall was facilitated by an inclined plane connecting the two floors.

The openings in the partition-walls between the several buildings were not confined to the fifth story, except in the Miller Building, which had no other connection with the Franklin Buildings.

It appeared that the plaintiffs had insured property, with the defendant and with other companies, contained in Sanborn's and Crowell's binderies, which were in chambers of the different buildings above mentioned, describing the several buildings having entrances on Federal Street by their numbers on said Federal Street.

Upon the foregoing evidence, the judge instructed the jury to return a verdict for the defendant. If the instruction was correct, judgment was to be rendered on the verdict; otherwise, the verdict to be set aside, and a new trial ordered.

A. Russ & D. A. Dorr, for the plaintiffs.

R. D. Smith & M. M. Weston, for the defendant.

DEVENS, J. The property insured was situated "in the chambers of Rand, Avery and Company, in stone, brick and iron building No. 117 Franklin Street, Boston." The defendant contends that the only property insured is that found in those chambers which were in the John Ritchie building, which building formed a part of the Franklin Buildings, which were erected as one structure, and each part of which had entrances on Federal Street, upon the ground that No. 117 Franklin Street was a separate building from those portions of the Franklin Buildings which abutted alone on Federal Street. The words do not require so narrow a construction as this. No. 117 Franklin Street was an entrance only to upper stories, the fifth story of all the structure known as the Franklin Buildings, to which it gave access, being occupied by the plaintiffs for their business. Conceding that the words "chambers of Rand, Avery and Company" are not to be separated from those which follow them, these latter words may well mean that the chambers are situated in the stone, brick and iron building to which an entrance is found at No. 117. There is no necessity for separating the chambers which are in the other portions of the same structure from those in that portion of the Franklin Buildings, because party-walls, for safety or convenience, or to indicate separate ownership, divide the structure, when doors have been made

between the buildings, and the chambers have been used together for different parts of the same business. Upon this part of the case, it seems to us that the learned judge was in error; and that the plaintiff should have been permitted to recover for the small amount of goods of the value of five dollars which were situated in the upper story of the Franklin Buildings at the time of the fire.

Whether the plaintiffs can recover for those goods which were in that portion of the chambers which were in the Miller Building is a more difficult, and to the parties a much more important, matter. The Miller Building was not only separated by partition walls, with independent means of access to Federal Street, but was a building entirely distinct from the Franklin Buildings. It was not built at the same time, nor did it present the same appearance. The levels of floors were different, and it was separated from the Franklin Buildings, not by a partition wall, but by two walls which were separate and independent, belonging respectively to each structure. If the plaintiffs may recover for the property here situated, it would seem that they might also recover for property used in their business in any set of chambers which could be connected with the entrance at No. 117 Franklin Street, provided only they were in a stone, brick and iron building. It is in substance the contention of the plaintiffs, that the operative words are "the chambers of Rand, Avery and Company," and that the only office of the rest of the phrase is to describe them as being reached by or having an access at No. 117 Franklin Street. But the number applies to a building described, and while, as this number is used to indicate an access to chambers in upper stories, it may be applied to all in that structure, it cannot be applied to such in other structures, even if by means of doors made through the walls of such structures access may be gained to them. Were the words "No. 117 Franklin Street" the only words which follow "chambers of Rand, Avery and Company," it might be held that all that was intended was to describe the access to them; but these words are used, not for this purpose, but to describe the access to the "stone, brick and iron building" in which the chambers are. They cannot be rejected or transposed. The rule that words may be rejected where they are clearly inconsistent with the rest of a description,

has no application, as it is entirely possible that the plaintiffs might have covered the property in their chambers in the Franklin Buildings and that in the chambers in the Miller Building by different policies. The description has no ambiguity, nor is any latent ambiguity developed when we seek to apply it to the facts, although, as thus applied, the property which the plaintiffs had in the Miller Building is not covered. When the words of a description can be satisfied, to reject a part would be to give a different interpretation to the contract from that which the parties have expressed, and therefore, we must believe, intended. Admit that we have a clear description when the words are stricken out, we have no right to strike them out if they can be construed where they are found. The description of the mode of occupation of the premises where the insured property is situate, is of great value; if any inconsistency were found between this and the locality named, there would be much ground for contending that the former should control, but no such inconsistency here appears.

The plaintiffs contend that the case is not distinguishable from *Blake v. Exchange Ins. Co.* 12 Gray, 265. The policy there covered personal property in "the brick building situate on Main Street in C., known as D. & Co.'s car factory." As thus written, it was held to cover goods in a building erected as a wing against the wall of D. & Co.'s car factory on Main Street, with an opening through the wall usually closed by an iron door, both wing and main building being used for manufacturing cars and known as "D. & Co.'s car factory." But the wing of a factory, one of whose walls is also that of the factory itself, deemed, used and known as a part of the factory, certainly differs materially from an independent building, although used in connection with another.

A majority of the court are therefore of opinion that the learned judge rightly ruled for the defendant, so far as the property in the Miller Building is concerned.

The result is, that the verdict must be set aside and a new trial ordered, unless the defendant shall consent to a verdict for the plaintiffs in the sum of five dollars. *Ordered accordingly.*

MARTHA F. PORTER *vs.* CITY OF NEWTON.

Middlesex. March 2, 1881; March 7.— May 5, 1882. ENDICOTT & DEVENS, JJ., absent.

The St. of 1877, c. 100, authorized a city to widen, deepen and straighten the channel of a certain brook, in any portion thereof between its source and its outlet in a certain river in said city, and to drain the lands abutting thereupon and adjacent thereto. The city passed an order that the superintendent of streets, under the direction of the highway committee, be authorized to construct a drain on and from a certain street, thence through another street to the brook in question at another street; and that a certain sum be appropriated for said work, to be charged to appropriation for sewerage and drainage. The drain ordered to be constructed did not include within its limits any part of the channel of the brook. A person, through whose land the waters of the brook passed, and above whose land the drain in question emptied into the brook, brought a petition for an assessment of damages caused by the construction of the drain; and offered evidence of the manner in which the drain was constructed until it entered the brook. He also offered to show, by the assistant superintendent of streets of the city, that in building this drain, and in order properly to construct the same, he and the men under him, without the petitioner's consent, entered upon his land, and removed a part of the bed of the brook; and that, in order to make the drain of any practical use, as directed by the city to be made, it was necessary to enter said land and to do what was done. No evidence was offered to show that these acts were done by the witness under the direction of the committee on highways mentioned in the order. The petitioner further offered to show that the city solicitor, in another proceeding, contended that the drain was built under the St. of 1877. *Held*, that there was no evidence that the city, in constructing the drain, acted under the St. of 1877, c. 100.

A petition to the mayor and aldermen of a city, for the assessment of damages occasioned to the petitioner's land by the construction of a drain, contained no reference to any statute, except that it prayed that the damages should be assessed and paid over according to the provisions of a certain statute. *Held*, on a petition to the Superior Court, for the assessment of damages, in the nature of an appeal from the action of the mayor and aldermen, that the court had power to allow the petition to be amended, if the petitioner could maintain the petition under any statute applicable to the proceedings.

A petition, under the St. of 1869, c. 111, for the assessment of damages for the making of a drain, in the city of Newton, must be addressed, under the charter of that city, St. 1873, c. 326, § 24, to the city council; and, if addressed to the mayor and aldermen, the petitioner cannot maintain a petition to the Superior Court, in the nature of an appeal from the order of the mayor and aldermen, giving him leave to withdraw.

PETITION to the Superior Court, alleging that the petitioner was, and had been since January 1, 1877, the owner in fee of a parcel of land in Newton, with a dwelling-house thereon; that an ancient brook called Cheese Cake Brook flowed through her

land, and was a highly ornamental, useful and valuable part thereof, and the water naturally running in said brook was pure, sweet and wholesome, and was used by the petitioner for drinking and other domestic purposes, until the action of the respondent hereinafter mentioned; that by the St. of 1877, c. 100, the respondent was authorized to widen, deepen and straighten the channel of Cheese Cake Brook, and to drain the land adjacent thereto; that, acting under and by virtue of the authority therein contained, the respondent, during the summer and fall of 1878, constructed a drain or common sewer along and under Auburn Street, and through the same to Washington Street and into Cheese Cake Brook, at a point on said brook where it flows across and under Washington Street, and above the land of the petitioner; that great quantities of dirty water and drainage were thereby emptied into said brook and carried on and over said land, all of which, before the construction of said drain or common sewer, emptied into said brook at a point thereon below the land of the petitioner, or not at all; that in consequence of the action of the respondent in constructing said drain or common sewer, that portion of said brook upon the petitioner's land had been permanently converted into a drain or common sewer, and the water therein had become foul and infected, and the petitioner had been deprived of the use thereof, to the great damage of her estate; that § 2 of the St. of 1877, c. 100, provided that the respondent should be liable to pay all damages sustained by any persons in their property by any doings under this act, and that the board of mayor and aldermen should award such damages to the owners of such lands; that the said board had, within six months of the filing of the petition, refused and neglected to award any damages; and that the petitioner was aggrieved thereby, and prayed that the damages sustained by her be determined and awarded to her.

The petitioner was afterwards allowed to amend her petition by adding thereto a second count, which contained substantially the same allegations as those in the first count, except those referring to the St. of 1877.

The answer admitted the petitioner's ownership of the land described in her petition, and that Cheese Cake Brook ran through the same; that the respondent had made a conduit for

the surface water of certain streets and entered the same into said brook just above the petitioner's land; denied that the respondent acted under the St. of 1877; and alleged that the action of the respondent had benefited and not injured the petitioner's land; and that the petitioner's remedy, if any, was by an action at law, and not by this proceeding.

Trial in the Superior Court, before *Bacon, J.*, who, after a verdict for the respondent, reported the case for the determination of this court. The report, after stating that the pleadings formed a part thereof, proceeded in substance as follows:

On September 2, 1878, the following order was passed: "Ordered, that the superintendent of streets, under the direction of the highway committee, be authorized to construct a drain on and from Greenough Street, Ward 3, thence through Auburn Street to Cheese Cake Brook at Washington Street. That a sum not to exceed seventeen hundred dollars is hereby appropriated for said work, to be charged to appropriation for sewerage and drainage."

During the fall of 1878, the city, acting under this order, constructed an underground drain, two feet and a half wide by two feet deep, and about eighteen hundred feet long, from a point in Greenough Street, along and under said street, to a point near its junction with Auburn Street, and thence under private land forming one of the corners of said streets to Auburn Street, and along and under said Auburn Street to Washington Street and into Cheese Cake Brook, at a point where it flows under said Washington Street and immediately thereafter enters upon the land of the petitioner. Another small, natural stream or brook was diverted from its course to enter said drain at a point near its beginning on Greenough Street, and carried through said drain into Cheese Cake Brook, which small stream, previous to the building of said drain, had always flowed into Cheese Cake Brook at a point below the land of the petitioner. At intervals in the gutters of said street there are constructed catch-basins connected with said drain, which receive and empty therein all the water which collects in the streets and the land around them. Said drain, so constructed by the city, received and carried off all the water coming from a natural watershed of perhaps half a mile south of Greenough Street.

It appeared that, before the construction of said drain, said streets and the lands abutting thereon, and yards and cellars of houses along the same, were in the spring of the year often flooded after heavy rains, and, so far as drained at all, they were drained by the low land through which said diverted brook formerly flowed. The evidence tended to show that this drain was constructed of ledge stone laid up dry, and that the top was covered with granite and the bottom paved; and it appeared that at the present time there are no sewers in the city of Newton, other than this drain, so constructed.

There was evidence tending to show that a culvert, opening from the land of one Allen, entered into said drain, the drain being built in such a way that the water coming into the culvert entered the drain, and that an underground pipe, coming from Allen's house, reached the surface of the ground within eight or ten feet of said culvert, and that a small channel led therefrom to near the culvert, and that sink water was conducted thereby within eight feet of said drain; and that Allen's land was drained by said culvert, but on this point the evidence was conflicting.

There was evidence tending to show that when said drain crossed private land, as heretofore described, it passed within eight feet of a privy vault; that the quantity of water in Cheese Cake Brook is largely augmented by the entry of said drain, especially in rainy seasons, and that on one or more occasions the stream, in consequence of said augmentation, has overflowed its banks, and occasioned damage by undermining the petitioner's land; and that, previous to the entry of the drain, the water in said Cheese Cake Brook was pure and clear, and more or less used for domestic purposes; that since the laying of said drain the water therein has been dirty and unfit for domestic uses, and that the petitioner's estate was reduced in market value to the extent of one thousand dollars.

On November 25, 1878, the present petitioner and her husband presented a petition addressed to the mayor and board of aldermen of the respondent city, containing substantially the same allegations as in the present petition, and praying the mayor and aldermen to assess and pay over the damages sustained "according to the provisions of chapter one hundred of the Acts

and Resolves of the Legislature for the year 1877." This petition was referred to the highway committee, who reported that the allegations of the petition, as regards the construction of a common sewer running into Cheese Cake Brook, were not true; that the drain on Auburn Street was made for surface water only; that the demand for damages under the St. of 1877, c. 100, could not be considered by the city, "until the completion of the widening of Cheese Cake Brook as made in accordance with said act;" and recommending that the petitioners have leave to withdraw. This report was accepted by the board of aldermen on December 16, 1878.

The petitioner put in evidence and relied upon the St. of 1877, c. 100, and for the purpose of showing that the city laid the drain under this act, put in the following orders of the city government:

"City of Newton. In Board of Aldermen. June 4th, 1877. Ordered, That the joint standing committee on highways shall reconstruct Cheese Cake Brook according to the rights, powers and privileges given to the city of Newton, by the Acts of the General Court in the year 1877, chapter 100. That a sum not to exceed three thousand dollars be and the same is hereby appropriated for such work, and such amount to be charged to the highway appropriation. Approved June 26, 1877. Alden Speare, Mayor."

"September 18, 1877. Ordered, That the joint standing committee on highways be authorized to continue the reconstruction of Cheese Cake Brook, and that a sum not to exceed two thousand dollars be and is hereby appropriated to carry on the work, and the same to be charged to highway appropriation."

The petitioner, for the purpose of showing that the city was acting under the St. of 1877, called one Fuller, who was at the time the drain was constructed assistant superintendent of streets of the respondent city, and, under the superintendent, had charge of its construction; and offered to show by him that in building this drain, and in order properly to construct the same, he and the men under him, without and against her consent, entered upon the land of the petitioner and removed a part of the bed of the brook. The judge excluded this evidence, and the petitioner excepted.

The petitioner also offered to show, by the same witness, that in order to make the drain of any practical use, as directed by the city to be made, it was necessary to enter said land and to do what was done. This offer was made for the same purpose, and also to show that authority so to enter was implied in the authority to build said drain under the order of September 2, 1878; but the judge excluded the offer, and the petitioner excepted.

The petitioner also offered to show that the city solicitor of the respondent, in another proceeding, in which the said solicitor appeared for said city, and in which the authority of the city and its servants to construct the drain was brought in question, then contended that it was built under the St. of 1877; but the judge excluded the evidence, and the petitioner excepted.

The petitioner contended that she could maintain her case under the St. of 1877, c. 100, and also under the St. of 1869, c. 111, and also under the Gen. Sts. c. 44.

At the close of the petitioner's case, the judge, at the request of the respondent, ruled that the petition could not, on the foregoing evidence, be maintained under the St. of 1877, c. 100, nor under the St. of 1869, c. 111, nor under the Gen. Sts. c. 44, and ordered a verdict to be returned for the respondent.

If the judge erred in excluding evidence as above stated, or if it was a case which should have been submitted to the jury, a new trial was to be ordered; otherwise, judgment to be entered on the verdict.

The case was argued at the bar in March 1881, and reargued in March 1882, by *H. E. Bolles*, for the petitioner, and by *P. Thacher*, for the respondent.

FIELD, J. The St. of 1877, c. 100, authorized the city of Newton "to widen, deepen and straighten the channel of Cheese Cake Brook, so called, in any portion thereof between its source and its outlet in Charles River in said city, and to drain the lands abutting thereupon and adjacent thereto." Two orders were passed under this act, but the proceedings under these orders are not complained of here.

It seems clear from the language of the order of September 2, 1878, and from the fact that the appropriation was to be charged

to the appropriation for sewerage and drainage, that this order was intended as an exercise of the power to construct sewers and drains, and not as an exercise of the power granted by the St. of 1877, c. 100. Moreover, the thing ordered to be done was not what was authorized by the St. of 1877, c. 100. The drain ordered to be constructed did not include within its limits any part of the channel of Cheese Cake Brook. The only connection that this drain had with Cheese Cake Brook was that it emptied into the brook above the lands of the petitioner.

The evidence offered by the petitioner in reference to the manner in which the drain was constructed until it entered Cheese Cake Brook, had no tendency to show that the city in constructing it was acting or attempting to act under the St. of 1877, c. 100.

The petitioner also offered to show, by the assistant superintendent of streets of Newton, "that in building this drain, and in order properly to construct the same, he and the men under him, without and against her consent, entered upon the land of the petitioner and removed a part of the bed of the brook," and "that, in order to make the drain of any practical use, as directed by the city to be made, it was necessary to enter said land and to do what was done." This offer was made for the purpose of showing that the city in constructing this drain was acting under the St. of 1877, c. 100. No offer was made to show that these things were done by the assistant superintendent of streets under the direction of the joint standing committee on highways. Section 1 of the St. of 1877, c. 100, authorizes the city of Newton, "by such agents or commissioners as the city council thereof may appoint, from time to time, to widen, deepen and straighten the channel of Cheese Cake Brook," &c., and we infer that the orders of June 4 and September 18, 1877, were passed by the city council; and the joint standing committee on highways named in said orders we infer to have been a joint committee of the city council, who were the agents appointed by the city council pursuant to § 1. The highway committee mentioned in the order of September 2, 1878, and in the report of that committee which was accepted on December 18, 1878, we infer to have been a committee of the board of aldermen authorized by that board to construct the drain. If the acts of the assistant

superintendent of streets in removing a part of the bed of the brook, as offered to be shown, were incidental to the completion of the drain, they must be presumed, in the absence of all evidence to the contrary, to have been done either without authority, or under the same authority by which the drain was constructed; and, as has been said, no evidence was offered that any of this work was done under the direction of the joint standing committee on highways.

The petitioner also complains that a natural stream of water which flowed into Cheese Cake Brook below her land was diverted from its course and made to enter the drain, and was carried through the drain into Cheese Cake Brook above her land, whereby the water of Cheese Cake Brook passing through her land was increased in quantity. It cannot be contended that this has any tendency to show that the city, in the diversion of this watercourse into the drain, and in the construction of the drain, was acting under the St. of 1877, c. 100; and the offer to show that the city solicitor in another proceeding "contended that it" that is, the drain, "was built under the St. of 1877," was clearly not evidence that the drain was built by the city under that statute. In *Central Bridge v. Lowell*, 15 Gray, 106, it was the answer of the city of Lowell, signed by the mayor in behalf of the city and countersigned by the city solicitor, made in a former case between the same parties, that was admitted in evidence against the city. There was therefore no evidence on which the petition could be maintained under the St. of 1877, c. 100.

The petitioner contends that the petition may be maintained under the St. of 1869, c. 111, or under the Gen. Sts. c. 44, §§ 19, 20. The substance of the petitioner's complaint, apart from the evidence offered to show that the city in constructing the drain was acting under the St. of 1877, c. 100, is that the city, by the construction of the drain and the diversion into it of a natural stream of water, has increased the quantity of water in the brook flowing through her land, and has rendered the water of the brook, which was formerly pure, impure and unwholesome. The original petition to the mayor and board of aldermen of the city prayed that the amount of the damages might be assessed and paid "according to the provisions of chapter 100 of the Acts

and Resolves of the Legislature for the year 1877;" on which petition the board of aldermen granted leave to withdraw, and the petitioner, being aggrieved, filed her petition in the Superior Court; and this petition has been so amended that it may be assumed to be in proper form for the recovery of damages, if damages are recoverable in this form of proceeding, under either the Gen. Sts. c. 44, §§ 19, 20, or under the St. of 1869, c. 111. The Superior Court had authority to allow an amendment to the petition in that court. *Winchester v. County Commissioners*, 114 Mass. 481.

It is contended that the petition could not be amended so as to state a different cause of action from that stated in the original petition to the mayor and aldermen of said city; but, if this be assumed, there is nothing in the original petition indicating under what statute the drain was constructed, or under what statute damages were claimed, except in the prayer at the end of the petition, and this alone ought not to prevent the petitioner from maintaining her petition under any statute applicable to the proceedings. By the charter of the city of Newton, St. 1873, c. 326, § 24, "the city council shall have exclusive authority and power to lay out any new street or town way, and to estimate the damages any individual may sustain thereby," and "any person dissatisfied with the decision of the city council in the estimate of damages may make complaint to the Superior Court," &c. The St. of 1869, c. 111, § 3, provides that "all persons or corporations suffering damage in their property, by reason of the laying, making or maintaining of any main drains or common sewers, shall have the same rights and remedies for ascertaining and recovering the amount of such damage, in the several cities, as in the case of the laying out of highways or streets in such cities respectively," &c. It follows, therefore, that if the petitioner intended to proceed under the St. of 1869, c. 111, the original petition should have been addressed to the city council, and not to the mayor and board of aldermen, and that these proceedings, being in the nature of an appeal from the order of the mayor and aldermen granting the petitioner leave to withdraw her petition addressed to that board, and not to the city council, cannot be considered as proceedings under the St. of 1869, c. 111.

There is no evidence that brings these proceedings within the Gen. Sts. c. 44, §§ 19, 20.

It is unnecessary to consider whether the petitioner has any remedy against the city for the acts complained of, by an action of tort, in accordance with the decisions in *Manning v. Lowell*, 130 Mass. 21, *Hill v. Boston*, 122 Mass. 844, and *Brayton v. Fall River*, 118 Mass. 218.

As no error appears in the rulings of the justice before whom this cause was tried, the entry must be

Judgment on the verdict.

JOSHUA COLE & others vs. INHABITANTS OF EASTHAM.

Barnstable. March 17. — May 15, 1882. ENDICOTT & C. ALLEN, JJ.,
absent.

The St. of 1879, c. 45, authorized a town to make the necessary improvements for the preservation and taking of alewives in a great pond and the waters connected therewith; enacted that the town should pay "all damages that shall be sustained in any way by any persons in their property, in carrying into effect this act;" and provided that any fishery so created should be the property of the town. *Held*, that a person whose land on both sides of a non-navigable stream, connecting with the pond, was taken under this act, could recover compensation only for the land taken, and not for the value of the fishery to him as a riparian owner.

PETITION for the assessment of damages for land taken under the St. of 1879, c. 45.* Trial in the Superior Court, before

* This act is as follows :

"Section 1. The town of Eastham is hereby authorized to make the necessary improvements for the preservation and taking of alewives in the Great Pond, so called, in the town of Eastham and the waters connected therewith and the outlet therefrom to the sea, and may take land and do all acts necessary for the purpose of establishing, protecting and regulating an alewife fishery in said waters.

"Section 2. The said town of Eastham shall be liable to pay all damages that shall be sustained in any way by any persons in their property, in carrying into effect this act. If any person sustaining damage as aforesaid shall not agree with the selectmen of the town upon the amount of damage to be

Brigham, C. J., who reported the case for the determination of this court, in substance as follows:

It appeared in evidence that the petitioners were owners of a lot of land extending on both sides of a non-navigable stream, through which alewives were accustomed to run; that the respondent town, for the purposes and in pursuance of the St. of 1879, *c. 45*, took possession of said stream and of the land on both sides of the stream; and that the petitioners claimed the right of an exclusive fishery in the stream by virtue of their riparian ownership.

The jury, in answer to questions submitted to them, found that the value of the land taken, excluding the value of the fishery, was \$166.66, and, including the fishery, was \$825.

The judge then ruled, against the petitioners' exception, that their right to the fishery as riparian owners was not an element of damage for which the respondent was liable under the St. of 1879, *c. 45*; and directed the jury to return a verdict for the petitioners in the sum of \$166.66, and ordered judgment accordingly.

If the ruling was right, judgment was to stand for the amount of the verdict; otherwise, judgment for the sum of \$825.

H. P. Harriman, for the petitioners. 1. At the time of the passage of the St. of 1879, *c. 45*, the petitioners owned land on both sides of a non-navigable stream, and had the exclusive right to take fish therein. Such a right has been recognized as private property in many cases. *Nickerson v. Brackett*, 10 Mass. 212. *Waters v. Lilley*, 4 Pick. 145. *Commonwealth v. Chapin*, 5 Pick. 199. *Vinton v. Welsh*, 9 Pick. 87. *McFarlin v. Essex*

paid therefor, he may have his damage assessed and paid in the manner provided by law in respect to land taken for highways.

"Section 3. Any fishery so created shall be deemed to be the property of said town of Eastham, and said town may make any proper regulations concerning the same, and may lease such fishery for a period not exceeding five years, upon such terms as may be agreed upon between said town and the lessees of the same.

"Section 4. No persons without the permission of said town or of the lessees of said fishery shall take, kill or haul on shore any alewives in the fishery so created by the town."

Sections 5 and 6 relate to penalties for the violation of the provisions of the act, and to prosecutions for the same.

Co. 10 Cush. 304, 309. *Commonwealth v. Essex Co.* 13 Gray, 239, 251. Angell on Watercourses, §§ 61-70.

2. Although this right was subject to be regulated by the Legislature, and to be taken away, if required for the public good, yet it stands in no different position from other private property; for every man holds his property subject to regulation by the Legislature, and subject also to the right of the Legislature to deprive him of it, if required for the public good. While the Legislature may, in the exercise of its police power, regulate the use of private property, it cannot take such property and devote it to public uses, without compensating the owner therefor. Declaration of Rights, art. 10. *Cottrill v. Myrick*, 12 Maine, 222.

3. Section 2 of the act in question provides, in the most general terms, that the town "shall be liable to pay all damages that shall be sustained in any way by any persons in their property, in carrying into effect this act." Section 3 distinctly recognizes the right of fishery to be property, by declaring that any fishery created by the act "shall be deemed to be the property of said town." The question therefore does not arise in this case, whether the Legislature could take the property of the petitioners, without providing compensation, and give it to the town, for the Legislature has provided for compensation, as it has previously done in similar cases. *McFarlin v. Essex Co.* and *Commonwealth v. Essex Co. ubi supra*.

G. W. Park & G. F. Piper, for the respondent.

DEVENS, J. By the common law the exclusive right to a fishery in a stream not navigable was in the proprietors of the banks, who, owning the bed of the stream *ad filum aquæ*, thus owned the land where such fishery was carried on. It was a right of taking the fish only, and did not involve the right to prevent their passage to the portion of the stream which lay above such fishery. But this rule has been modified in this Commonwealth by successive legislative acts from the earliest settlement of the country, passed under the two governments of the Plymouth and Massachusetts Bay Colonies, as well as under the Province and our present form of government. There was much jealousy on the subject of exclusive individual privileges in fisheries, and much desire to protect the public in the

enjoyment of such privileges. The laws of Plymouth Colony provided that "fishing, fowling and hunting be free," while they also provided that the General Court might make a grant to one who desired to improve and stock a place of a private fishery. Such was the law when the town of Eastham, which was a part of Plymouth Colony, was settled in 1646, and also when the two Colonies were united in the Province of Massachusetts Bay. Plymouth Col. Laws, 29, 34, 282. Anc. Chart. 213, 229. Const. Mass. c. 6, art. 6.

It was especially deemed for the public good that certain fisheries, like those for salmon, shad and alewives, which furnished an abundant supply of healthful and agreeable food, should be subjected to public control and dealt with as public property whenever the Legislature should see fit to interpose. "From the first settlement of the State," says Mr. Dane, "men have understood that they have held these non-navigable rivers and streams, subject to this legislative control, and, therefore, it is, as it were, a part of our common law." 2 Dane Ab. c. 68, art. 6, § 1. The paramount claims of the public are thus necessarily implied in all grants of the lands abutting on these streams, and the rights of citizens of this Commonwealth in the fisheries are to be determined according to the effect of this ancient and long-established system of legislation, rather than by the principles of the common law. *Nickerson v. Brackett*, 10 Mass. 212. *Commonwealth v. Chapin*, 5 Pick. 199. *Vinton v. Welsh*, 9 Pick. 87. Angell on Watercourses, § 85.

The diligence of the counsel for the respondent has enabled them to furnish a long list of acts passed by the Provincial Legislature and that of the Commonwealth, by which the full control over and property in the alewife fisheries within their limits has been transferred to the towns in which they were located, not only as to the mode in which the fishery shall be pursued, but as to the persons by whom they shall be enjoyed. These acts are very various in form, but all treat these fisheries as properties belonging to the Colony, Province or State, which the Legislature may confer upon the town, on such terms as it deems proper for the interest of the public, and which may be managed by the towns or their authorities as they see fit, subject to the regulations made. The days of taking the fish are

- sometimes prescribed by the Legislature and sometimes left to the town. These acts provide sometimes for the taking of fish by all the inhabitants, for the sale of this right, for the distribution of the fish taken among the inhabitants, or for the price at which the fish shall be sold to them; also for gratuitous distribution to those who are judged by the town or the selectmen too poor to pay. They provide sometimes for the sale of the right for money, with authority to the town to dispose of the money by vote, and, where more than one town is interested in the same fishery, for the proportions in which they shall divide the money. Sales of the fish to others than inhabitants of the town are forbidden. Penalties are imposed for violations of the regulations made by the Legislature, or those which the towns may make. No exercise of authority over property could be more complete than that which is exhibited in these assertions of the public right. We cite a few of these acts only, as they are very numerous. Prov. St. 1754-5 (28 Geo. II.) c. 31; 3
- Prov. Laws (State ed.) 809. Prov. Sts. 1770-1 (11 Geo. III.) cc. 3, 21; 1772-3 (13 Geo. III.) c. 48; 1773-4 (14 Geo. III.) c. 29; 5 Prov. Laws (State ed.) Sts. 1791, cc. 19, 51, 63; 1792, c. 76; 1795, c. 83; 1796, c. 83; 1798, c. 83; 1799, c. 76; 1801, cc. 81, 66. However these acts may vary, they all are alike in this, that no provision is made for indemnity from the towns (who are treated as representing the public right) to any riparian owners, and their fishing privileges are treated always as subordinate to it.

It is true that those persons authorized to construct dams across streams are so under the implied obligation to provide sufficient sluices and fishways for the passage of fish, and that a grant made by the Legislature to erect a dam across a river is to be construed as under the implied condition to keep open fishways for the benefit of riparian owners of fisheries as well as of towns, unless such implication is excluded by an express provision. *Stoughton v. Baker*, 4 Mass. 522.

Where dams have been authorized by the Legislature, even when fishways have been provided for therein, as these might prove but partially sufficient, the riparian owners of fishing rights above have also been allowed to recover damages against the owners of the dams. *McFarlin v. Essex Co.* 10 Cush. 304.

Commonwealth v. Essex Co. 13 Gray, 239. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 453.

As against all others than the public, the riparian owners of these fishing privileges have the rights which belong to private property. When these rights are taken away or diminished for the benefit of those engaged in a private enterprise for their own profit, although deemed by the Legislature so much for the public advantage that they should be allowed by the right of eminent domain to take private property, they have been permitted to do so only upon the condition of providing suitable compensation. In such cases, the Legislature has not invested them completely with the public right, subject to which the riparian owners hold their fishing privileges, and which by long usage it has been accustomed to confide to towns in the interest of the public for the purpose of controlling the fishery within their limits and receiving its emoluments.

The petitioners further contend that, whether the Legislature could or could not take the right of fishery, which the petitioners had in a non-navigable stream, for the benefit of the town of Eastham, without providing proper compensation therefor, the Legislature did provide such compensation, and that such is the true construction of the St. of 1879, c. 45. The object of the act, as seen by the first section, is to enable the town "to make the necessary improvements for the preservation and taking of alewives in the Great Pond, so called, in the town of Eastham and the waters connected therewith and the outlet therefrom to the sea;" and the town is authorized to "take land and do all acts necessary for the purpose of establishing, protecting and regulating an alewife fishery in said waters." As the second section requires the town to pay all damages sustained in any way by any persons in their property, and as the third section further enacts that "any fishery so created shall be deemed to be the property of said town of Eastham," it is argued that the fishery of the petitioners is recognized as property which before the taking belonged to them, and after the taking became the property of Eastham upon payment of compensation. But, in view of the law which exists and has long prevailed in this Commonwealth, it must be considered that the property for which the petitioners are to receive compensation is private property strictly, and not

such as is held by them subject to the exercise of a public right; and that the property obtained by the town of Eastham in the fishery is thus obtained in trust for the public, and in virtue of the public right to control through its agency an important fishery of the Commonwealth for the benefit of its citizens.

The verdict rendered for the petitioners for the smaller sum, which was the value of the land taken, was therefore correct.

Judgment affirmed.

GEORGE R. SMITH vs. ANSON K. WARNER.

Franklin. May 24. — June 26, 1882. ENDICOTT & LORD, JJ., absent.

A creditor of an insolvent debtor, who has a mortgage of real estate of the debtor as security for his claim, and who joins with the assignee in insolvency in making sale of the property, without the order of the judge of insolvency, cannot be allowed, under the Gen. Sts. c. 118, § 27, to prove the residue of his claim, after applying the proceeds of the sale.

APPEAL by George R. Smith from a decision of the Court of Insolvency, disallowing a claim against the estate of John Martin. The case was submitted to the Superior Court, and, after judgment for the appellee, to this court, on appeal, upon agreed facts, in substance as follows :

In 1880, John Martin was adjudged insolvent by the Court of Insolvency, on the petition of the appellant as trustee; the appellee was on the same day appointed assignee of the estate of said insolvent; and an assignment of said estate was duly made to him. At the time of said adjudication, Martin was indebted to the appellant as trustee, upon a promissory note secured by a mortgage of land in Deerfield. After the appointment of the assignee, he and the appellant agreed to join in making a sale of said land, and that the proceeds arising from the sale should be indorsed on said note. In pursuance of said agreement they advertised the land for sale in a newspaper published in Greenfield, as follows :

“ Assignee’s Sale.

“ At the residence of John Martin, in Deerfield, on Tuesday, March 23, 1880, at 1 o’clock P. M., will be sold at public auction,

the homestead of about sixty acres, subject to incumbrance. Said farm is desirably located, and in good state of cultivation. Terms made known at the time of sale. A. K. Warner, assignee.

"And I, Geo. R. Smith, trustee, holding a second mortgage of the above-described property, will at the time and place above named sell all my right, title and interest in and to said property. Geo. R. Smith, trustee."

A sale of the same was made, the assignee acting as auctioneer, and he and the appellant executed to the highest bidder at the sale their several deeds of the same; and the appellant indorsed the amount of the proceeds of the sale upon said note; but there was no order of the judge of the Court of Insolvency as to said sale.

The appellant claimed the right to prove the balance of said note, and offered to prove the same against the estate of Martin at the second meeting of his creditors, and the assignee did not oppose the allowance of said claim; but the judge of the Court of Insolvency, on the suggestion of the counsel for the debtor that the appellant had not complied with the provisions of the Gen. Sts. c. 118, § 27, disallowed the claim.

If the appellant was entitled to prove the balance of said note against the estate of Martin, judgment was to be entered in his favor; otherwise, for the assignee.

G. D. Williams, for the appellant.

F. G. Fessenden, for the appellee.

C. ALLEN, J. If construed literally, the Gen. Sts. c. 118, § 27, do not allow proof of this claim. A creditor having security may make application for an order of sale, and the sale is to be made in such manner as the judge orders, and after such sale, and an application of the proceeds towards the payment of his debt, he shall be admitted as a creditor for the residue. The creditor contends that a broader construction may be given to the statute, and that he may be allowed to prove for the residue, after applying the proceeds of a sale made without an order of court, but with the concurrence of the assignee. But we do not think so. The statute provides a plain method of procedure, and we think it better to hold this prescribed method to be the exclusive one. The action of the assignee in joining in the sale

no doubt had the effect to give a good title to the purchaser, but is ineffectual in enabling the creditor to prove his claim. His agreement to allow the proof of a claim is of no significance, if the law does not allow such proof to be made. The statute might have provided that the value of the security should be determined in some other way than by a sale made under order of the court, as, for instance, by an agreement between the creditor and the assignee; but it has not done so. In other cases, it is provided by § 46 that the court may make an order concerning the time, place and manner of selling the property of the insolvent debtor; in this case, the statute provides that the sale shall be made in such manner as the judge orders, and that, if the property is not so sold, or released and delivered up to the assignee, the creditor shall not be allowed to prove any part of his debt. This implies that the judge is to fix, if he sees fit to do so, the time and place of the sale, the terms, whether on credit or for cash, the manner, whether by public auction or private sale, and the notice to be given. It has also been decided that the validity of the security held by the creditor must be determined before ordering a sale. *Day v. Lamb*, 6 Gray, 523. This court has also a general supervisory jurisdiction, to relieve a party aggrieved by a decision upon a petition for a sale. *Eastman v. Foster*, 8 Met. 19. *Barnard v. Eaton*, 2 Cush. 294. While there is no reason to doubt that the sale in the present case was conducted in good faith, and it is not found as a fact that the price realized was unreasonably small, we nevertheless find, in the meagreness of the notice which was given, an illustration of the reasons which might well lead the Legislature to require a judicial supervision of the sale. No mention was made, in the notice, of the amount of the first or second mortgage, the terms of the sale, or the situation of the property, or what buildings were upon it; and there was little to invite the attendance of any purchasers who were not already well acquainted with these particulars. *Judgment affirmed.*

ISAAC PARKER vs. ELECTA P. RUSSELL.

Franklin. May 24. — June 28, 1882. ENDICOTT & LORD, JJ., absent.

If the breach of a contract by one person to support another for his life is such that the latter may treat the contract as absolutely broken, and he so elects to treat it, he may recover damages for the whole value of the contract.

A declaration alleging that, in consideration of the conveyance by the plaintiff to the defendant of certain real estate, the defendant agreed to support the plaintiff during his life, and that the defendant accepted the conveyance and occupied the estate, but refused and neglected to perform his agreement, is sufficient to enable the plaintiff to recover damages as for a total breach of the agreement.

In an action for breach of an agreement by the defendant to support the plaintiff during his life, it appeared that the defendant supported the plaintiff in the former's house for five years, when the house was destroyed by fire; and that from the date of the fire to the date of the writ, a period of about two years, the defendant furnished no aid or support to the plaintiff. The judge instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole." *Held*, that the defendant had no ground of exception.

CONTRACT. The declaration alleged "that the defendant, in consideration of the conveyance by the plaintiff to the defendant of certain real estate in Deerfield, promised and agreed to support and maintain the plaintiff, furnishing him with all things necessary and convenient in sickness and in health, during the natural life of the plaintiff; that the defendant accepted said conveyance, and has occupied and used said estate, but has refused and neglected and still neglects and refuses to perform her said agreement." Writ dated September 14, 1880. Trial in the Superior Court, before *Bacon, J.*, who allowed a bill of exceptions, in substance as follows:

The evidence tended to show that, in March 1873, the defendant, for a good consideration, agreed to support the plaintiff during his life; that she did support him in her house from that time till about October 1, 1878, when her house was destroyed by fire; and that since the fire the defendant had furnished no aid or support to the plaintiff.

The defendant requested the judge to rule that damages could only be recovered in this action for failure to furnish

support to the plaintiff prior to the date of the writ; and that damages for such failure since the date of the writ must be sought in another action. The judge declined so to rule; and instructed the jury that if the defendant, for a period of about two years, neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support, and full indemnity for his future support.

The defendant also requested the judge to rule that the plaintiff, under his declaration, could not recover damages for any period subsequent to the date of the writ; but the judge declined so to rule.

The jury returned a verdict for the plaintiff in the sum of \$972.25; and found specially that the support of the plaintiff, under the terms of the contract, from the date of the fire to the date of the writ, was of the value of \$377.40, and that the same from the date of the fire to the date of the trial was of the value of \$473.60. In case the plaintiff should not be entitled to damages under the rule laid down by the judge, judgment was to be entered for the one sum or the other, as this court should determine the rule of damages to be. The defendant alleged exceptions.

F. L. Greene, for the defendant.

A. De Wolf, for the plaintiff.

FIELD, J. In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the date of the writ, and not up to the time when the verdict is rendered. *Fay v. Guynon*, 131 Mass. 31.

But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract. *Amos v. Oakley*, 131 Mass. 413. *Schell v. Plumb*, 55 N. Y. 592. *Remeelee v. Hall*, 31 Vt. 582. *Fales v. Hemenway*, 64 Maine, 373. *Sutherland v. Wyer*, 67 Maine, 64. *Lamoreaux v. Rolfe*, 36

N. H. 83. *Mullaly v. Austin*, 97 Mass. 80. *Howard v. Daly*, 61 N. Y. 362.

Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract they include damages for not performing the contract in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels v. Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

The cases cited by the defendant are not inconsistent with these views. In *Pierce v. Woodward*, 6 Pick. 206, the declaration was for a breach of a negative promise, namely, "not to set up the business of a grocer" within certain limits; and it was held that the damages could be assessed only to the date of the writ. The defendant might at any time, without the consent of the plaintiff, stop carrying on the business, when the plaintiff's damages would necessarily cease.

Powers v. Ware, 4 Pick. 106, was an action of covenant broken, brought by the overseers of the poor, under the St. of 1793, c. 59, § 5, for the breach of a covenant to maintain an apprentice under an indenture of apprenticeship. The court in the opinion speak of the common-law rule in assessing damages only to the date of the writ. But the statute under which the action was brought prevented the overseers from treating the contract as wholly at an end, because it gave the apprentice a right of action when the term is expired, "for damages for the causes aforesaid, other than such, if any, for which damages may have been recovered as aforesaid," that is, by the overseers.

Hambleton v. Veere, 2 Saund. 169, was an action on the case for enticing away an apprentice; and *Ward v. Rich*, 1 Vent. 103, was an action for abducting a wife; and neither throws much light on the rule of damages for breach of a contract.

Horn v. Chandler, 1 Mod. 271, was covenant broken upon an indenture of an infant apprentice, who under the custom of London had bound himself to serve the plaintiff for seven years; the declaration alleged a loss of service for the whole term, a part of which was unexpired; on demurrer to the plea, the declaration was held good, but it was said "that the plaintiff may take damages for the departure only, not the loss of service during the term; and then it will be well enough." But if this be law to-day in actions on indentures of apprenticeship, it must be remembered that they are peculiar contracts, in which the rights and obligations of the parties are often affected by statutory regulations, and in some cases they cannot be avoided or treated as at an end at the will of the parties.

In this case, the declaration alleges in effect a promise to support the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole." We cannot say that this instruction was erroneous

as applied to the facts in evidence in the cause, which are not set out.

The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us.

Judgment on the verdict for the larger sum.

EDWARD P. GOULDING & another vs. CHARLES N. HAIR.

Worcester. Oct. 4, 1881. — June 26, 1882. LORD, W. ALLEN & C. ALLEN, JJ., absent.

A creditor of a mortgagor of personal property caused it to be attached while in the possession of the mortgagor on a writ in which the mortgagee was summoned as trustee, under the Gen. Sts. c. 123, § 67. The mortgagee filed a general answer, denying that he had any goods or credits of the defendant in his possession, but not disclosing his mortgage, and was thereupon discharged by the court, without objection by the creditor and without being further examined. The attaching officer duly sold the goods on mesne process before the trustee was discharged, and, after said discharge, the officer levied an execution issued in said action upon the proceeds of the sale, and paid them over to the creditor. *Held*, that the discharge of the trustee operated as a dissolution of the attachment; and that the mortgagee might maintain an action against the attaching officer for the proceeds of the sale. *Held, also*, that it was no defence that the defendant had made a second attachment of the same property on a writ in favor of another creditor of the mortgagor in an action in which the mortgagee was summoned as trustee, which action was pending at the time the present action was brought, and in which the trustee had not been charged or discharged.

CONTRACT for money had and received by the defendant to the plaintiff's use. The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, on an agreed statement of facts, in substance as follows:

On June 12, 1880, Robert P. Jordan of Worcester made a mortgage of his stock in trade and the fixtures of his shop to the plaintiffs, to secure the payment of his promissory note for \$315, which mortgage was duly recorded. Subsequently, and while Jordan was in possession of said stock in trade and fixtures, and the plaintiffs held the mortgage, George Bassett, on July 31, 1880, brought an action against Jordan to recover the amount of

a debt due him from Jordan, and the defendant in this action, a constable of Worcester, made an attachment of said stock and fixtures, and summoned the plaintiffs in this action as trustees and mortgagees of said Jordan. This trustee writ was in the usual form, and was returnable on August 7, 1880. The authority of the defendant to make said attachment and to summon said mortgagees as trustees, and the validity of said mortgage, are not questioned. Said mortgage remains unpaid and is overdue.

During the pendency of the action of Bassett against Jordan, the stock and fixtures so attached were on August 19, 1880, duly sold on mesne process by said attaching officer for \$410; and the net proceeds of said sale were held by said officer upon said attachment. On August 21, 1880, Bassett obtained judgment against Jordan in said action, execution issued thereon on August 30, 1880, and said officer levied upon the proceeds of sale, and, after deducting his fees, paid over to Bassett's attorney the sum of \$305.48; and on September 13, 1880, returned said execution in part satisfied, a balance being still due on said judgment. The regularity of the proceedings of said sale is not questioned.

On August 7, 1880, the return day of the writ in said action, the plaintiffs in the present action, knowing that the property of said Jordan covered by said mortgage had been attached in said action and was held upon attachment therein by the defendant, appeared by counsel and filed their answer under oath, setting forth that at the time of the service of the plaintiffs' writ upon them, they had no goods, effects or credits of Jordan in their hands or possession. No other or further answer was made by said mortgagees, and no questions were put to them by the court or by the plaintiff touching the consideration of the mortgage or the amount due thereon. On August 21, 1880, on motion of the attorney for said mortgagees and trustees, which was not opposed or consented to by Bassett's attorney, these plaintiffs were discharged upon their answer, with costs. After the officer had made his levy on said execution, and had paid over the proceeds of said sale as aforesaid, said mortgagees, on September 13, 1880, first demanded of the attaching officer the amount claimed by them to be due upon their mortgage note,

by serving upon him a demand therefor in writing, stating therein that they held a mortgage from Robert P. Jordan upon said property attached by said officer to secure said note.

On July 31, 1880, Habecker and Killain brought an action against Jordan to recover a debt due them from him, by writ returnable on August 7, 1880. Upon this writ, a second attachment was made by the defendant upon said mortgaged property, and the plaintiffs in the present action were summoned as mortgagees and trustees of Jordan. They appeared by counsel in said action, and, knowing of the attachment of the mortgaged property, filed an answer similar to that in Bassett against Jordan, not disclosing their mortgage or the amount claimed to be due thereon, or any claim upon the property attached. On September 15, 1880, said mortgagees filed an amended answer, after this action was brought, disclosing their mortgage and the amount alleged to be due thereon, and thereupon said action, as between said Habecker and Killain and these plaintiffs, was, on October 26, 1880, continued to await the result of the case at bar, judgment having been entered in favor of Habecker and Killain against Jordan for the amount declared for.

If, on these facts, the plaintiffs were entitled to recover, judgment was to be entered for them in the sum of \$315, and interest from the date of the writ; otherwise, judgment for the defendant.

C. A. Merrill, for the defendant.

S. Uiley, for the plaintiffs.

MORTON, C. J. The statutes provide two modes in which a creditor of a mortgagor may make an attachment of mortgaged personal property. He may attach it in the usual form, as if it were unincumbered, provided that he pays to the mortgagee the amount for which it is liable, within ten days after due demand is made upon him. Or, when the property is in the possession of the mortgagor, he may attach it as if it were unincumbered, and summon the mortgagee as trustee in the same action. Gen. Sts. c. 123, §§ 62-71. Pub. Sts. c. 161, §§ 74-83.

If the last-named course is adopted by the creditor, the mortgagee is required to appear and submit himself to examination touching the consideration of his mortgage and the amount due thereon, and the creditor may, if he so elect, require the question

of the validity of the mortgage to be tried by a jury. If the mortgagee fails to appear and is defaulted, he is estopped to set up the validity of his mortgage, and cannot maintain an action against the attaching officer for a conversion of the mortgaged property by a levy of the execution thereon. *Flanagan v. Cutler*, 121 Mass. 96. On the other hand, if he appears, and the attaching creditor sees fit to discontinue against him, or he is discharged, the attachment is thereby dissolved. *Martin v. Bayley*, 1 Allen, 381. *Hayward v. George*, 13 Allen, 66.

In the case before us, the plaintiffs held a valid mortgage upon the stock in trade and fixtures of one Jordan. One Bassett, a creditor of the mortgagor, who was in possession of the mortgaged property, caused it to be attached by the defendant, and the mortgagees to be summoned as trustees under the Gen. Sts. c. 123, § 67. The mortgagees appeared and filed a general answer that they had no goods, effects or credits of the defendant Jordan in their hands or possession. They were afterwards discharged by the court. Although the answer in this form was irregular, yet, by appearing and answering, they submitted themselves to examination by the court, or by the plaintiff in that suit. It was the right of the plaintiff to ask such questions as he saw fit touching the consideration of the mortgage and the amount due thereon. If he wished to dispute the validity or amount of the mortgage, it was his duty, in the exercise of proper diligence in pursuing the remedy he had chosen, to examine the trustees. His failure to do so, and the fact that he made no objection to the discharge, was equivalent to a discontinuance as to the trustees, and the court rightly ordered that they be discharged. Such discharge put an end to the creditor's right to pursue the remedy he had adopted, and worked a dissolution of his attachment. Upon such dissolution, the mortgagees became entitled to the money, which, after the sale, the defendant held in place of the attached goods, and may maintain this action therefor, unless there is some other defence.

But the defendant contends that the action is prematurely brought because there was a second attachment upon the goods which is still existing, the suit in which it was made being still pending. The facts are, that while the defendant held the goods under the first attachment, namely, on July 31, 1880,

other creditors of Jordan made a second attachment of the mortgaged property and summoned the plaintiffs as trustees. This suit is still pending. But it appears that on August 30, 1880, the goods having in the mean time been duly sold on mesne process under the statute, and Bassett having obtained judgment against Jordan, the defendant levied Bassett's execution upon the money in his hands and paid it over to the attorney of Bassett. These acts of the defendant put an end to and vacated the second attachment, and it cannot now be set up as a defence in this suit. *Boynton v. Warren*, 99 Mass. 172. We are therefore of opinion that the Superior Court rightly ruled that, upon the facts agreed, the plaintiffs were entitled to maintain this action.

Judgment for the plaintiffs affirmed.

ANN MCCOY vs. METROPOLITAN LIFE INSURANCE COMPANY.

Bristol. Oct. 27, 1881. — June 28, 1882. MORTON, C. J., W. ALLEN & C. ALLEN, JJ., absent.

If an application for a policy of insurance on the life of a person provides that the representations and answers made therein "shall form the basis and become part of the contract of insurance," and "that any untrue answers will render the policy null and void," and the policy recites that it is issued "in consideration of the representations and agreements in the application for this policy, which application is referred to and made a part of this contract," in an action upon the policy the application is to be considered a part of the contract, and if the representations in it are in a material respect untrue, the action cannot be maintained, although the untrue representations were inserted in the application by the agent employed by the defendant to solicit insurance, without the knowledge of the applicant, who orally stated the truth to the agent; and the Sts. of 1861, c. 170, and 1864, c. 114, do not apply.

In an action upon a policy of life insurance, the declaration in which contains two counts, one for the amount of the insurance, and the other for money had and received, it is not open to the plaintiff to contend upon exceptions in this court that, under the second count, he can recover the amount of the premiums paid, on the ground that the policy never attached, if the question was not raised at the trial.

CONTRACT on a policy of insurance on the life of Ellen McCoy payable to the plaintiff, with a count for money had and received by the defendant to the plaintiff's use. Trial in

the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

The policy in question was dated July 5, 1880, and was issued upon an application, purporting to be signed by Ellen McCoy, which provided that "the undersigned hereby declares and warrants that the representations and answers made below, and in the examination on the other side, are strictly correct and wholly true; that they shall form the basis and become part of the contract of insurance, (if one be issued,) that any untrue answers will render the policy null and void, and that said contract shall not be binding upon the company unless at the time of its delivery the insured be alive and in sound health."

Among the questions and answers forming part of the application were the following: Question, "When last sick?" Answer, "Never seriously." Question, "Name and address of physician?" Answer, "None." Question, "Is said life now in sound health?" Answer, "Yes."

The policy recited that it was issued "in consideration of the representations and agreements in the application for this policy, respecting the person named in the schedule hereinafter contained, which application is hereby referred to and made a part of this contract; and in consideration of the payment to said company" of the premiums.

The policy also contained the following conditions: "Sixth. Agents are not authorized to make, alter, or discharge contracts, or waive forfeitures." "Eighth. If the representations upon which this policy is granted be not true, or if the conditions of said policy be not in all respects observed, . . . this policy shall thereupon become void."

The plaintiff put in evidence tending to show that, on or about June 22, 1880, the plaintiff, at the request of one Hargraves Watson, who was employed by the defendant to solicit insurance on its behalf, and receive and forward applications therefor, consented to take out policies of insurance in said company upon the lives of three of her children, one of whom was the said Ellen; that Watson then asked the plaintiff the name, age and place of residence of each of said children, including Ellen, and the name, age and place of residence of their parents, and the name of the beneficiary, to all which questions the plaintiff

returned true answers. The plaintiff testified that she told Watson, at the time of making said application, that Ellen was sick and could not pass a doctor; and that Watson replied that it would make no difference, they would insure her. Watson, who was one of the plaintiff's witnesses, denied this, and testified that he did not know that the girl was or had been sick until after he had delivered the policy. It also appeared that Ellen, who died on August 25, 1880, of tuberculosis, was attended by a physician during her last illness; and he, being called as a witness by the plaintiff, testified that he first attended Ellen five months prior to her death; that she was then sick with consumption and had been so for some time; and that her condition was then very bad, although he hoped, when he first began to attend her, to arrest the progress of the disease.

The application was filled up by Watson, partly by writing in the answers given by the plaintiff to him as aforesaid, and partly with other answers and representations which were false and untrue, and of which neither the plaintiff nor Ellen had any knowledge; and he signed her name to the application without her knowledge. He then forwarded the application, so filled in, to the defendant, received therefor the policy declared on, and delivered the same to the plaintiff, who accepted it and paid the premiums thereon to Watson, who forwarded them to the company, until the death of Ellen. Watson did not see Ellen, or have any communication with her in reference to said insurance or otherwise, until after the delivery of the policy.

Until the death of Ellen, neither the defendant, nor its officers, nor any of them, had any knowledge of the condition of Ellen's health at the time of making the application or issuing the policy, except as set forth in the application, or that the application had not been signed by Ellen, or that Watson had filled out the application without her knowledge.

It was admitted by the plaintiff, that the answers in the application stating that Ellen had never been seriously sick, had no physician, and was then in sound health, were made by Watson without the knowledge of the plaintiff or Ellen, and were false and untrue; and that the condition of Ellen's health was such that the defendant would not be liable if the application had been written out and signed by Ellen with her own hand.

The plaintiff asked the judge to rule that, if all the answers given by the plaintiff to Watson were true, and if the condition of Ellen was made known to him, and he made all said false answers and representations without the knowledge or consent of the plaintiff or Ellen, it was a fraud on the part of its own agent which the defendant was estopped to deny.

The defendant asked the judge to rule that the representations and agreements contained in the application were a part of the contract of insurance, and were warranties, and, inasmuch as those relating to the sickness of Ellen, and her condition of health, and her employment of a physician, were untrue, the plaintiff could not recover.

The judge declined to rule as requested by the plaintiff, and gave the ruling asked for by the defendant; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

J. W. Cummings, for the plaintiff.

A. J. Jennings, (*J. M. Morton* with him,) for the defendant.

FIELD, J. The plaintiff contends that Watson was the agent of the company, and that the case is to be governed by *Insurance Co. v. Wilkinson*, 13 Wall. 222, and *Insurance Co. v. Mahone*, 21 Wall. 152, and other similar cases. But the doctrine of these cases has never been adopted by this court. The exceptions find that Watson "was employed by the defendant to solicit insurance on its behalf, and receive and forward applications therefor."

In an action at law in this Commonwealth on such a policy, to recover the amount of the insurance, the application is considered as a part of the contract, and if in fact the representations in it are in a material respect untrue, the action cannot be maintained; and oral testimony cannot be received to show either that the company when it issued the policy knew that the representations were untrue, or that the untrue representations were inserted in the application by the agent employed by the company to solicit the insurance without the knowledge of the applicant who had orally stated the truth to the agent. *Kibbe v. Hamilton Ins. Co.* 11 Gray, 163. *Draper v. Charter Oak Ins. Co.* 2 Allen, 569. *Campbell v. New England Ins. Co.* 98 Mass. 381. *Miles v. Connecticut Ins. Co.* 3 Gray, 580. *Lee v.*

Howard Ins. Co. 3 Gray, 588. *Holmes v. Charlestown Ins. Co.* 10 Met. 211. *Barrett v. Union Ins. Co.* 7 Cush. 175. *Lowell v. Middlesex Ins. Co.* 8 Cush. 127. *Jenkins v. Quincy Ins. Co.* 7 Gray, 370.

This case is not affected by the Sts. of 1861, c. 170, and 1864, c. 114. *Markey v. Mutual Benefit Ins. Co.* 103 Mass. 78.

It is unnecessary to consider whether the statements in the application amounted to warranties, because the false representations were plainly material to the risk. The ruling of the presiding justice was therefore correct, that the plaintiff could not recover on the policy.

It is now contended that the plaintiff may, under the second count of the declaration, recover the amount of the premiums paid, on the ground that the policy never attached. But this question was not raised in the Superior Court, and is not before us.

Exceptions overruled.

ELIZABETH BRYANT vs. HARRIET TIDGEWELL & another.

Essex. Nov. 2, 1881. — June 28, 1882. MORTON, C. J., W. ALLEN & C. ALLEN, JJ., absent.

The declaration, in an action by a wife under the St. of 1879, c. 297, alleged that, on divers days and times between dates specified, the defendant sold intoxicating liquors to the plaintiff's husband, and that, in consequence of such sales to and drinking by her husband, he acquired confirmed habits of intoxication, and became and was habitually drunk and intoxicated. *Held*, that it was open to the plaintiff to prove sales of intoxicating liquor, which produced intoxication in her husband, on more than two occasions.

If, in an action of tort against two defendants, one of the defendants calls the other as a witness, he cannot, before the credibility of the witness has been attacked by the plaintiff, put in evidence, for the purpose of sustaining the testimony of the witness, that the witness was without any means to satisfy any judgment that might be obtained against him.

An action may be maintained by a wife, under the St. of 1879, c. 287, for all damages sustained by the intoxication of her husband, if such intoxication was caused "in whole or in part" by liquor sold to him by the defendant, although during the time covered by the declaration the husband purchased intoxicating liquor of persons other than the defendant, which caused his intoxication in part.

In an action by a wife, under the St. of 1879, c. 297, for damages sustained by the intoxication of her husband, alleged to be caused by liquor sold to him by the

defendant, the defendant is not responsible for all damages caused to the plaintiff by any habits of intoxication to the formation or confirmation of which the defendant contributed, unless the liquor sold by the defendant caused, in whole or in part, the intoxication complained of.

TORT, under the St. of 1879, c. 297, against Harriet Tidgewell and Thomas Allen. Writ dated February 7, 1880. The declaration contained two counts.

The first count alleged that the plaintiff was, and had been for several years past, the wife of Amasa F. Bryant; that her husband, prior to and since April 30th last, was in the habit of using intoxicating liquor to excess, and was in the habit of becoming drunk and intoxicated; that this habit of drunkenness of said Amasa was well known to the defendants; that the plaintiff notified the defendant Tidgewell not to sell or deliver to her said husband intoxicating liquors; but said Tidgewell, regardless of said notice, did, on divers days and times between said April 30 and February 7, 1880, sell and deliver to her said husband intoxicating liquor, which said Amasa drank, and was made drunk and intoxicated thereon; that, in consequence of such sales to and drinking by said Amasa, he acquired confirmed habits of intoxication, and became and was habitually drunk and intoxicated, and thereby her efforts to reform him were rendered ineffectual; that in consequence of such sales and habits of drinking said Amasa neglected his work, and neglected his duties towards her, and treated her rudely and unkindly, and threatened her with personal violence; that, in consequence of such sales, drinking and habits, she was made sick, and said Amasa neglected to provide her with proper care and treatment, and she suffered in mind and health; and, in consequence of all the aforesaid, she had been greatly injured in her person and property and means of support; that said defendant Allen was the owner of the building and premises where said Tidgewell kept and sold said intoxicating liquor to said Amasa, and he leased the same to said Tidgewell with knowledge that intoxicating liquors were to be sold therein, and said Allen knowingly permitted the sale of intoxicating liquors therein; whereby, by force of the statute in such case made and provided, an action had accrued to the plaintiff.

The second count alleged that Amasa F. Bryant was the plaintiff's husband, and was before and since April 30th last; that said husband was in the habit of using intoxicating liquors to excess; that since said April the plaintiff notified said Tidgewell not to sell or deliver to her said husband intoxicating liquor; that after said notice, said Tidgewell did sell and deliver intoxicating liquor to her said husband; that said husband drank the same and became intoxicated thereon, and, while so intoxicated, said Amasa assaulted the plaintiff; that at the time of said assault she was sick, and on account of said assault she was made more sick, and suffered great pain of body and mind, and was greatly injured in her person, property and means of support; that said Allen was owner of the building and premises where said Tidgewell sold and delivered said intoxicating liquor to said Amasa, and that he, said Allen, let the premises with knowledge that intoxicating liquor was to be sold therein, and that said Allen knowingly permitted the sale of intoxicating liquor in said premises; whereby an action, by force of the statute, had accrued to the plaintiff, to recover in damages against these defendants. Answer, a general denial.

Trial in the Superior Court, before *Putnam, J.*, who allowed a bill of exceptions, in substance as follows:

The defendant Allen contended that, under the declaration it was not open to the plaintiff to prove sales of liquor, which produced intoxication in the husband, on more than two occasions; but the judge ruled otherwise; and, against Allen's objection, admitted evidence tending to prove sales on very many different days during the period covered in each count of the declaration.

The defendant Allen called as a witness the defendant Tidgewell, who testified to matters material to the issue. For the purpose of sustaining her credit as a witness, Allen offered to prove by her that she was without any means to satisfy any judgment which might be obtained against her in this case; but the judge excluded the evidence.

The plaintiff called her husband as a witness, and, on cross-examination, he testified that, during the period covered by the declaration, he was in the habit of purchasing liquor of third persons by the glass, to the extent of at least six-fold more than

he purchased during said period of Tidgewell, who always sold him liquor by the glass.

The defendant Allen asked the judge to instruct the jury as follows: "1. If the jury find that, during all or a portion of the time set forth in the declaration, the plaintiff's husband made frequent purchases of liquors of parties other than the defendant Tidgewell, and that these purchases caused his intoxication during that period or a portion of it, the defendants are not liable for the injury to the plaintiff which was attributable to the intoxication which was produced by such purchases. 2. If the jury find that, during all or a portion of the period covered by the declaration, the husband made frequent purchases of liquors of parties other than the defendant Tidgewell, and that such purchases contributed to his intoxication during that period or a portion of it, then the defendants are not liable for the injury which was attributable to the intoxication aggravated by such purchases, and which would not have accrued to the plaintiff except for such aggravation. 3. Mental suffering on the part of the plaintiff caused by contemplating the intoxication of her husband does not constitute an element of damage in this case."

The judge declined to give the first instruction as requested, but gave it inserting the word "alone" before the words "caused his intoxication"; and also declined to give the second instruction; and, instead thereof, instructed the jury as follows: "The defendants are responsible for all damages caused to the plaintiff by any intoxication which they had any share in producing, or caused by any habits of intoxication to the formation or confirmation of which they contributed. The fact that during the same period other persons by their sales had caused his intoxication will not exonerate the defendants, if the intoxication was aggravated by the sales made by the defendants, and the injury to the plaintiff would not have been occasioned except for such aggravated intoxication." The judge also declined to give the third instruction as requested, but gave the same with the addition of the word "mere" before the words "mental suffering," and with the following qualification: "But if her mental suffering and excitement, growing out of his conduct towards her while intoxicated, directly caused her sickness, that may be considered by you as an element of damage."

The jury returned a verdict for the plaintiff in the sum of \$650; and the defendant Allen alleged exceptions.

E. T. Burley, for the defendant.

C. U. Bell, (*E. J. Sherman* with him,) for the plaintiff.

FIELD, J. The first exception was submitted without argument by the defendant. The declaration alleges "habitual intoxication," and it was open to the plaintiff to prove sales on more than two occasions.

As to the second exception, the credibility of the witness had not been attacked by the plaintiff. It appears that the witness was one of the defendants, and therefore directly interested in the suit. The evidence offered by the other defendant, that the witness was "without any means to satisfy any judgment which might be obtained against her in this cause," had no tendency to show that she was not actually interested as defendant in the suit. Whether evidence of the kind offered ought ever to be received to rebut evidence of interest or bias, is at least doubtful, and it may perhaps depend upon the nature of the evidence it is offered to rebut; but we think it ought never to be received, in the first instance, when offered by the party who calls the witness, for the purpose of supporting his testimony; and that the court did right in excluding it.

The first instruction asked for was properly modified by the court. The St. of 1879, c. 297, gives a right of action against any person who shall have caused the intoxication "in whole or in part."

The second instruction asked for was also rightly refused. If the defendants caused the intoxication in whole or in part, then by the terms of the statute they are liable to the wife, if she be injured in person or property or means of support "in consequence of the intoxication," for all damages sustained; and the statute does not attempt to apportion the damages when persons other than the defendants have contributed to the intoxication.

The instruction given in place of the second instruction asked for, we think, does not correctly state the law. Under this instruction, the jury may have found that the defendants contributed to the formation of habits of intoxication, although they did not cause the intoxication in whole or in part of which the

plaintiff in her declaration complained. The defendants may have contributed to the formation of habits of intoxication by the plaintiff's husband, without ever having proximately, in whole or in part, caused him to become intoxicated. All the intoxicating liquors the defendants ever sold the plaintiff's husband may have been sold before she became his wife, and yet the defendants may have thus contributed to the formation of habits of intoxication, and the actual intoxication of which the plaintiff complains may have been wholly caused by other persons than the defendants. Whether the intoxication be "habitual or otherwise," the defendants to be liable must in whole or in part have actually caused the intoxication, and the injuries must have been received in consequence of such intoxication, or from a person whose intoxication was thus caused by the defendants. A habit of becoming intoxicated is distinguishable from actual intoxication.

For this reason, without discussing the remaining exceptions, a

New trial must be ordered.

URIEL H. CROCKER, trustee, vs. JAMES DILLON & others.

Suffolk. March 19, 1880; Nov. 18, 1881. — June 26, 1882. W. ALLEN & C. ALLEN, JJ., absent.

A testator named R. executor of his will, and R. and D. trustees thereof, and gave full power to them or the survivors of them to deal with the trust estate. He also gave to the trustees specific sums to hold on separate trusts for the benefit of three persons named, and also created a residuary trust fund. R. was duly appointed executor, and subsequently sole trustee. D. was never appointed trustee, and filed in the Probate Court a resignation of his trust. On the same day that R. was appointed sole trustee, his first account, filed some time before, was allowed by the Probate Court, at the request of persons other than the three beneficiaries, and without further notice, in which he credited himself as executor with moneys paid to the trustees of the beneficiaries equal in amount to the sums named in the will. At that time R. had funds in his hands sufficient for this purpose. On the same day, three other accounts, signed by R. and D. as trustees, and containing items of income paid over to the three *cestuis que trust* at different times, were allowed by the Probate Court with the assent of the *cestuis que trust*. A second and final account of R. as executor was subsequently allowed by the Probate Court, showing his disbursements of all the assets in his hands as executor when the first account was rendered, in which

he credited himself with a certain sum paid to himself as trustee of the residuary trust fund. He also filed an account as trustee of the residuary trust fund; and was subsequently removed by the Probate Court from the offices of executor and trustee. *Held*, on a bill in equity, by his successor in the trusts, to determine whether, as between the specific and the residuary *cestuis que trust*, R. as executor had paid to himself as trustee the moneys specifically left in trust, that the accounts filed by him warranted a finding that he had so paid them.

If a person, who is a legatee and also *cestui que trust* under a will, fraudulently receives from the executor of, and trustee under, the will, property which forms part of the principal of the trust fund, and converts it to his own use, a person subsequently appointed trustee may retain, out of the income afterwards coming to the *cestui que trust*, the amount so converted.

Objections to a bill in equity that the plaintiff has an adequate remedy at law, and that the bill is multifarious, are waived by answering and submitting to the jurisdiction of the court, and going to hearing on the merits.

BILL IN EQUITY by Uriel H. Crocker, who had been appointed trustee under the will of James Dillon, and administrator *de bonis non*, with the will annexed, of the estate of said Dillon, in place of one Rand, executor of, and trustee under, said will, who had been removed from both offices by the Probate Court, against James Dillon, Edward S. Dillon, Minnie M. Dillon, Mary E. Brigham, Perry Brigham, Salome M. Haven, Mary Dillon, Margaret Dillon and John Dillon, to obtain the instructions of the court, upon these questions:

First. Whether certain bequests to Rand and John Dillon, as trustees, on separate trusts for Mary E. Brigham, Perry Brigham and Salome M. Haven, had been paid to the trustees by Rand as executor.

Second. Whether the plaintiff, as administrator, had power, in case the bequests should be deemed not to be paid, to sell certain land of the testator for the payment thereof, or whether he should hold the land on the trusts.

Third. Whether the plaintiff, as trustee, should, in accounting with James Dillon, one of the residuary *cestuis que trust* under said will, withhold from his share of income a sum equal to the value of certain property alleged to have been converted by said James to his own use, and of any notes of James held by the plaintiff as trustee.

Fourth. Whether the plaintiff, as trustee, should pay to the residuary *cestuis que trust* the whole of the net income of the residuary trust fund, and, if so, in what proportions.

The case was heard by *Morton, J.*, on the report of a master and exceptions thereto; and a decree was entered that the bequests for the benefit of Mary E. Brigham, Perry Brigham and Salome M. Haven had been paid in full; that the plaintiff in accounting with James Dillon should withhold from his share of income the sum of \$2505; and that the trustee was to pay one half of the net income of the residuary trust fund to Minnie M. Dillon, one quarter to Edward S. Dillon, and one quarter to James Dillon.

From this decree, Mary E. Brigham, Perry Brigham, Salome M. Haven and James Dillon appealed to the full court. The facts appear in the opinion.

The case was argued in March 1880, and reargued in November 1881.

H. W. Chaplin, for the plaintiff.

M. Storey, for Mary E. Brigham, Perry Brigham and Salome M. Haven.

W. W. Vaughan, for James Dillon.

H. H. Sprague, for Edward S. Dillon and Minnie M. Dillon.

ENDICOTT, J. Two questions are now presented in this case: First, whether the three legacies named in the will of James Dillon to one Rand and John Dillon, as trustees for Mary E. Brigham, Perry Brigham, and Salome M. Haven respectively, have been paid to the trustees by Rand as executor. Second, whether from the income of James Dillon, who is one of the *cestuis que trust* under the residuary clause of the will, the plaintiff as trustee can withhold the amount of \$2505, which James Dillon has converted to his own use from the principal of the trust fund.

James Dillon died in 1872, leaving a will, in which Rand was named executor, and by the terms of the will he was exempted from giving sureties on his bond. The will was admitted to probate in June 1872. Rand accepted the trust, and gave bond without sureties. By this will the testator gave legacies to his two sisters of \$5000 each; and \$15,000 in trust to Rand and John Dillon, to pay the income for life to Mary E. Brigham, the principal at her decease to fall into the residue. He also gave to them \$5000 in trust, the income to be paid to Perry Brigham, until he attained the age of twenty-one years, the principal then

to be paid to him, but in case of his death before twenty-one to fall into the residue; and a like sum was given to them upon a similar trust in favor of Salome M. Haven. The residue of the estate was to be divided into six equal parts. One sixth to be paid absolutely to each of his two sons, James and Edward S. Dillon, and the remaining four sixths to Rand and John Dillon in trust, the income thereof to be paid over in equal parts to his three children, James Dillon, Edward S. Dillon, and Minnie M. Dillon, during their lives respectively. And provision was made for the distribution of the principal on the death of each beneficiary.

The will evidently contemplates that one trustee might act, as it gives full power to both trustees, or to the survivor, to deal with the trust estate. John Dillon was never appointed trustee, and his resignation of the trust was filed in the Probate Court, and was accepted on June 7, 1875. Rand was not appointed trustee until June 14, 1875, when he gave bond without sureties under the St. of 1873, c. 122, and received a certificate of appointment from the Probate Court. On the same day that he was thus appointed sole trustee, his first account as executor, filed sometime after January 1875, was allowed in the Probate Court, at the request of James Dillon, Edward S. Dillon and Minnie M. Dillon, without further notice. This account contained no later date than January 7, 1875, and in it Rand credits himself, as executor, with \$15,000 paid to the trustees of Mary E. Brigham, with \$5000 paid to the trustees of Perry Brigham, and with \$5000 paid to the trustees of Salome M. Haven. It is to be remembered that, simultaneously with the allowance of this account, Rand was appointed sole trustee. Previously to June 14, and on that day, Rand had sufficient personal estate in his hands to pay these sums.

Three other accounts, entitled "trustees' first account," signed by Rand and John Dillon, as trustees for the benefit of Mary E. Brigham, Perry Brigham and Salome M. Haven, were allowed by the Probate Court on June 14, with the written assent of the several *cestuis que trust*. These accounts contained items of income paid over to the several *cestuis que trust*, as received from the executor from time to time prior to January 1875. The payments were made by Rand alone, John Dillon having

taken no active part in the management of the trust before he declined the office. Rand as executor was not bound to pay over these items to himself and Dillon as trustees; but, as these items would be received for the benefit of the beneficiaries, subject only to the contingency that the estate might prove insolvent, the executor might safely advance these amounts, the trustees being liable to return the same, if required by the executor for the payment of debts. But this contingency did not arise, for the estate at that time was perfectly solvent. This course pursued by Rand was in conformity with the decision in *Minot v. Amory*, 2 Cush. 377. These accounts, therefore, simply show payment to the trustees before their formal appointment, and before the transfer to them, or the survivor of them, of the principal of the trust funds; and it was proper that they should contain the statement, that no other payments had been made to Dillon and Rand as joint trustees. This statement cannot be regarded as contradictory to the statement in Rand's first account as executor, that he had paid over the several sums due to the trustees of Mary E. Brigham, Perry Brigham and Salome M. Haven, for that fact could not appear until Rand had, by an account, discharged himself as executor, by transferring the funds to himself as trustee. *Conkey v. Dickinson*, 13 Met. 51. Rand in his account as executor credits himself with the several payments made in these so-called trustees' accounts.

A second and final account by Rand as executor, was allowed in the Probate Court, in March 1877, showing his disbursements of all the assets in his hands as executor when the first account was rendered, in which he credits himself with \$7964.32 paid to the trustees under the will of James Dillon; and, on the same day, the Probate Court allowed a first and second account of Rand as sole trustee, under the residuary clause of the will, for the benefit of James Dillon, Edward S. Dillon and Minnie M. Dillon, in which he charges himself with this sum of \$7964.32. He filed no accounts as trustee for the Brighams and Salome M. Haven.

It appears by these accounts that Rand had settled the estate, and accounted for all the personal property in his hands as executor, and had paid over to the several trusts of which he was the trustee the several sums to which they were entitled.

In April 1877, he fled from the Commonwealth, and after from the United States, having apparently squandered appropriated to his own use the great bulk of the funds which by his several accounts he held as trustee. Before he left the United States, and while in New Jersey, James Dillon, one of the beneficiaries under the residuary clause, who held a power of attorney from Rand as trustee to manage the trust estate and to make payments on account of it, obtained from him a transfer as executor of one hundred and fifty-five shares of the stock of the Boston Wharf Company, which was known by Dillon to be a part of the principal of the trust estate held by Rand. By pledging this stock Dillon raised \$4928; a portion of this was paid to Mary E. Brigham as the income of the trust in her favor, a portion to the account of Edward S. Dillon and Minnie M. Dillon, and the balance of \$2505 he retained himself. In May 1876, Dillon also obtained from Rand a transfer of twenty shares of stock in the Old Colony Railroad Company, which stood in Rand's name as executor. Dillon sold these shares, and appropriated the proceeds to his own use.

The only personal property of any present value which the plaintiff—who, after Rand's removal, was appointed trustee under the will, and also administrator with the will annexed—has been enabled to obtain as trustee, is nine shares in the Atlantic National Bank. The plaintiff has also received the rents of certain real estate, which is described in an indenture made June 4, 1875, by Rand as executor and James Dillon and Edward S. Dillon, containing a release of James Dillon and Edward S. Dillon to Rand and John Dillon as trustees, and also containing a release by Rand as executor to James and Edward Dillon of certain other real estate. This division embraced all the real estate remaining unsold.

After his appointment, the plaintiff received, among other papers left by Rand, a note of Rand to himself as trustee for \$7964, being the same amount he had charged himself with as trustee for the Dillons, two notes of \$5000 each, signed by him payable to himself as trustee for Perry Brigham and Salome M. Haven respectively, and a note of \$1690. On all these notes, which were dated January 1, 1875, interest was indorsed to January 1, 1877. There was also a note of James Dillon to Rand

as trustee, for a small amount. These notes were admitted by the master, but not on the question of the payment of the trust fund to the trustee. They were competent as showing Rand's management of the trust estate. The master finds that all the notes were made after September 1875. There was no note to himself as trustee for Mary E. Brigham.

There were also put in evidence before the master accounts of the Brigham and Haven trust funds entered by Rand in an account-book during his trusteeship. They purported to show receipts, January 1, 1875, by Rand trustee, of the amounts of those funds. On the account with Mary E. Brigham were entered various dividends on shares of stock in the Atlantic National Bank, the Boston Wharf Company and the Old Colony Railroad Company, together with interest on the note of \$1690. Evidence was introduced before the master bearing on the time when the entries were made, but the master merely finds that they were made by Rand while trustee. It does not appear in the master's report, nor was it contended in the argument, that Rand did not in fact pay income to the Brighams and Haven, while he was trustee, under his appointment as such, though he never filed an account to that effect.

This statement shows great irregularity and criminal misconduct on the part of Rand, in the management of the trusts assumed by him under the will. For, as it is expressly agreed that on June 14, 1875, when Rand's first account as executor was allowed, he had in his hands enough personal estate to pay the specific bequests in trust for the benefit of the Brighams and Salome M. Haven, it must be assumed that his defalcations occurred after that time. And the question is whether the loss is to fall upon the trusts created in their favor, or upon the legatees under the residuary clause.

There are two important findings of the master, so far as the first question to be decided is concerned. 1. "I find that, by rendering said accounts as executor and trustee, Rand became and was chargeable, as trustee under the will, with personal property to the amount of \$7964.32, held for James, Edward S. and Minnie M. Dillon, with personal property to the amount of \$15,000, held for Mary E. Brigham, with personal property to the amount of \$5000, held for Perry Brigham, and with personal

property held for Salome M. Haven to the amount of \$5000. I find, on the evidence of said accounts, that personal property to the amount of the three sums last named was transferred to the trust on or prior to the fourteenth day of June 1875." 2. "I find that the stocks mentioned were not specifically appropriated to either of the trust funds." The second finding refers to the shares of stock on which dividends had been paid to Mary E. Brigham, some of which shares are now in the hands of the plaintiff; and it is only of importance in that it excludes her from contending that these shares form a part of the trust fund for her benefit.

It is true, as contended by the counsel for the Brighams and Haven, that nothing but the payment of legacies can discharge the claim of legatees upon the testator's estate. And where bequests are given in trust, and the executor and the trustee named in the will are different persons, it must appear that there was a specific and absolute transfer of the trust fund by the executor to a trustee duly qualified to receive it. But where the same person is named both as executor and trustee under a will, and the same hand is to pay and receive the money, there can be no evidence of the actual transfer of the property from himself in one capacity to himself in another, except from some declaration or authoritative and notorious act on his part showing a change in the manner in which the property is held. And an executor who is also trustee under a will cannot be considered as holding any part of the assets in the latter capacity until he has settled an account in the Probate Court as executor, in which he is credited as executor with the amount which he holds as trustee; and such account should not be allowed by the judge of probate, without first requiring him to give bond for the faithful performance of his duties as trustee. *Hall v. Cushing*, 9 Pick. 395, 409.

In *Conkey v. Dickinson*, 13 Met. 51, 54, it was said by Mr. Justice Wilde, in citing *Hall v. Cushing*, "that case, it is true, did not necessarily require a decision on that point; but it was supposed that it would become important on a hearing in chancery, and it was therefore argued by counsel, and the question was decided, after full deliberation; and we see no cause to doubt the correctness of the decision."

But it is contended, that a payment by the executor to himself as trustee can only be established by filing both an executor's account showing payment to the trustee, and a trustee's account showing the receipt of the payment. We are not aware of any case in this Commonwealth where that has been expressly decided to be necessary, and the cases cited by counsel do not sustain the proposition. A sworn account, allowed in the Probate Court, in which the executor credits himself with the amount of such a bequest as a payment to the trustee under the will, he being the trustee named therein, and his appointment at the same time as trustee, and his giving the bond required by law for the faithful performance of his duties as such, would certainly seem to discharge him as executor, and vest the trust fund in him as trustee. His obligation to file an inventory or an account is a duty imposed upon him by his bond, and it cannot be that his failure or neglect to perform such duty as trustee, in regard to the trust fund, can render him still liable only as executor, and not as trustee. It would be a breach of his bond as trustee, and not of his bond as executor.

In *Hall v. Cushing, ubi supra*, a testator left his personal property to his children, and directed his executors to invest it and hold it for their education and maintenance, and to divide the principal among them as they became entitled to it respectively under the terms of the will. The action was on the bond of one of the executors, and the alleged breach was that the executor received and held in his hands, while executor, and during the minority of the children, a large amount of personal property, after the payment of all debts and charges in settling the estate, and refused to dispose of and invest it according to the directions of the will. It was held that the action could be maintained, as the executor had neglected his official duty. It was contended by the defendants, that a transmutation of the property was effected by operation of law to the executor as trustee, and his duties as executor ceased, and the sureties on his executor's bond were not liable. But Mr. Justice Wilde said: "Before there could be any transmutation of property, as contended for by the defendants' counsel, the executor must have settled his final account of administration in the Court of Probate, in which the balance due from him as executor should

be allowed to his credit, as being retained by him in his capacity as trustee for the minor children. And such an allowance would not, it is to be presumed, be made by the judge of probate, without first requiring him to give bond for the faithful performance of his duties as trustee."

This case is affirmed in *Conkey v. Dickinson*, 13 Met. 51, which holds that, where the same person is both an executor and a guardian, he is not chargeable, as guardian, with the amount of a legacy left to his ward, until he credits himself with it in his account as executor as paid to himself as guardian, and this account is allowed by the Probate Court; and that the fact that he charges himself with the legacy in an account prepared by him as guardian, but not presented to the Probate Court, is immaterial.

In *Newcomb v. Williams*, 9 Met. 525, the action was on an executor's bond. Two persons were appointed executors. The testator gave all his property to certain nephews, subject to the payment of his debts, and provided that Russell, one of the executors, should be trustee to hold the same upon certain trusts, and in the manner directed by the will. The executors rendered an account of their administration, showing a balance for which they were accountable, and which was retained in the sole possession of Russell, who was named trustee in the will. No other account was rendered by both executors, but Russell rendered a further account, and the Probate Court ordered that he should pay the balance thereof to the nephews, as directed by the will, but he failed to do so. He had not been appointed or given bond as trustee, and had not assumed or elected to act in that capacity, and the accounts did not show that the balance had been paid to him as trustee. It was held that the taking of the money by Russell under these circumstances did not discharge the executors, although Russell was named sole trustee; and that the action could be maintained on their bond.

In *Elliott v. Sparrell*, 114 Mass. 404, which was an action of contract to recover interest upon a legacy, the following facts appeared: Joshua Magoun died in 1857, leaving a will, in which he gave to his granddaughter a legacy of \$500, to be paid to her by his executors when she should arrive at the age of twenty-one years, and made further provision as to its distribution in

case of her death before reaching that age, and also this provision: "The said five hundred dollars bequeathed to my granddaughter Lucy C. Elliott, I direct to be taken from my personal estate, before making a division of the same, and invested by my executors for the especial purpose of paying the above-named legacy." John Sparrell and James W. Magoun were duly appointed executors. Lucy C. Elliott, the plaintiff, became of the age of twenty-one years on October 10, 1872, and soon after demanded of the executors the legacy, and the income and interest thereof. James W. Magoun paid her \$500, with interest thereon from October 10, 1872; both he and Sparrell refused to pay income or interest thereon accruing prior to October 10, 1872. The executors filed separate accounts. In the account of Sparrell, allowed April 12, 1859, this payment appears: "To legacy to T. J. Elliott's daughter, \$500; and in Magoun's account, allowed February 8, 1859, this receipt appears: "February 4, 1858. Cash of John Sparrell, \$500." In Magoun's account, allowed May 8, 1860, was the following item of payment: "By cash in his hands reserved for the payment of legacy given by the will of the deceased to be paid Lucy C. Elliott on her arriving at the age of twenty-one years, \$500." It was held that it was the clear meaning of the will that the \$500 should be separated from the rest of the estate and invested so as to bear interest, and the accumulation would belong to the legatee and become part of the legacy to be paid her at twenty-one. And it was said, "The only question, therefore, is whether the sum of \$500 was taken from the other personal estate by the executors, as directed, and set apart as the legacy to the plaintiff. On this point, we think the accounts of the executors are decisive that it was." "It has been so held by the executor, separate from the other personal property, as the legacy of the plaintiff; and this appears in the most authoritative form in which the act of an executor can be established, by his sworn account in the Probate Court." "It is an 'authoritative and notorious act,' showing a change in the manner in which the property was held, as mentioned in *Newcomb v. Williams*, 9 Met. 525, 584."

So, upon the facts of the case before us, there were authoritative and notorious acts of Rand showing a change of the property

from himself as executor to himself as trustee, and we are of opinion therefore that the bequests for the benefit of Mary E. Brigham, Perry Brigham and Salome M. Haven have been paid. If there had been sureties on Rand's bonds, we cannot doubt that the sureties on the executor's bond would have been discharged, and those on his bond as trustee held for his defalcation.

The only other question properly presented to us upon this record is whether the plaintiff, as trustee, in accounting with James Dillon, who is one of the *cestuis que trust*, can withhold from his share of the income the amount of \$2505, which he has converted to his own use from the principal of the trust fund. The master has found, upon evidence which in our opinion justifies the finding, that James Dillon appropriated the said sum to his own use, knowing the state of the trust estate and that the same was the proceeds of property held as a part of the principal of the trust estate. It is clear that, upon principles of equity, and in justice to the other *cestuis que trust*, the plaintiff ought to be allowed to retain out of the income coming to James Dillon the amount which he has fraudulently abstracted from the trust fund.

The defendant James Dillon contends that the plaintiff is not entitled to the relief which he asks against him, because he has a plain, adequate and complete remedy at law. But it is too late to take this objection, after answering and submitting to the jurisdiction of the court, and taking his chances of a hearing upon the merits. *Dearth v. Hide & Leather National Bank*, 100 Mass. 540. *Page v. Young*, 106 Mass. 313. *Jones v. Keen*, 115 Mass. 170. So the objection that the bill is multifarious should have been taken by demurrer, and is waived by the defendant by going to a hearing upon the merits. 1 Dan. Ch. 346. Story Eq. Pl. § 284. *Oliver v. Piatt*, 3 How. 333.

The result is, that the presiding justice who heard the case rightly overruled the exceptions to the master's report, and the decree entered by him should be affirmed. *Decree affirmed.*

JOSEPH F. DAVIS *vs.* CITY OF BOSTON.

Suffolk. March 2, 1881; January 24. — June 26, 1882.

A child, who is excluded from a public school in a city by a teacher acting without authority from the school committee, cannot maintain an action against the city, under the Gen. Sta. c. 41, § 11, without first appealing to the school committee.

TORT under Gen. Sts. c. 41, § 11, brought in the name of the plaintiff by his next friend to recover damages for the unlawful exclusion of the plaintiff from the Harvard Grammar School, in the Charlestown District of Boston, by the principal of the school.

At the trial in the Superior Court, before *Allen, J.*, the plaintiff's evidence tended to prove that the plaintiff was fourteen years of age, a legal resident of said district, and that he had attended said school for several years previously to the alleged exclusion; that the teacher, who had charge of the class in which the plaintiff was, had occasion to administer corporal punishment to him for disobedience and impertinence in school; that the plaintiff refused to submit to punishment, and was told by his teacher to go to the principal of the school in another room in the same building; that the plaintiff, instead of going to the principal, went home, and after several days returned and offered to the teacher to submit to punishment; that the teacher commenced to punish the plaintiff, but before the punishment was completed the plaintiff refused to submit to further punishment, and was told by the teacher to go to the principal, and again went home; that this was repeated several times, the plaintiff each time, when ordered to report himself to the principal, absenting himself for several days, and then returning and offering to submit to punishment, and, after the punishment was partly inflicted, refusing to submit to further punishment; that on the last occasion the teacher ordered him to go home, and told him that he could not return to his class until he had submitted to punishment; that afterwards, on the same day, the plaintiff, with his father, went to the school, and had an interview with the principal, Mr. Eaton. The plaintiff testified, that his father had some conversation with Mr. Eaton alone; that Mr. Eaton

then called the plaintiff in, and asked him if he was ready to receive his punishment; that the plaintiff said he was; that Mr. Eaton then asked him if he was willing to receive his punishment, and the plaintiff answered that he could not say that he was willing, but that he would receive his punishment; that Mr. Eaton told him that he could not punish him unless he said that he was willing; that the plaintiff said he could not say he was willing, as he did not think he had done anything to be punished for, but that Mr. Eaton might punish him; that Mr. Eaton said he could not punish him unless he said he was willing, and told him to go home. The father of the plaintiff testified that he told Mr. Eaton to punish the plaintiff as he would one of his own children; that the plaintiff told Mr. Eaton that he would take his punishment; that Mr. Eaton asked him if he was willing to be punished, and the plaintiff answered that he could not say that he was willing; that Mr. Eaton said that the school committee would not allow him to punish the plaintiff unless he said that he was willing to be punished; that Mr. Eaton told the plaintiff to go home, and that he would not have him in school unless he said he was willing to be punished. The plaintiff's testimony also tended to prove that the punishment inflicted on him by the teacher, when he refused to submit to further punishment by her, was excessive. On all the above matters there was conflicting evidence introduced by the defendant.

The father of the plaintiff further testified, for the plaintiff, that, in answer to a written request, he received from Mr. Eaton a letter, dated February 24, 1880, as follows: "In response to your request why your boy 'has been excluded from school,' I have to say what you already know: (1.) that he has not been absolutely excluded from school; and (2.) that I am willing to receive the boy, when he comes in an obedient spirit and willing to receive his punishment, to be given for impertinence to his teacher. Allow me further to state, that, if you are dissatisfied with my methods of discipline, you can properly appeal to the school committee."

The plaintiff contended that the questions, whether the punishment inflicted by the teacher was excessive, and whether the condition on which the principal would allow the plaintiff to

remain in the school was unreasonable, were material questions in determining whether he had been unlawfully excluded from the school, which should be submitted to the jury upon the above evidence.

The judge ruled that the evidence offered by the plaintiff was not sufficient to sustain the action, and directed a verdict for the defendant, and reported the case for the determination of this court.

J. H. Cotton, for the plaintiff.

T. M. Babson & F. Ames, for the defendant.

MORTON, C. J. This action is brought under the statute, which provides that "a child unlawfully excluded from any public school shall recover damages therefor in an action of tort, to be brought in the name of such child by his guardian or next friend against the city or town by which such school is supported." Gen. Sts. c. 41, § 11. Pub. Sts. c. 47, § 12.

The evidence, viewed in the light most favorable to the plaintiff, tended to show that he was guilty of several acts of disobedience and insubordination in the school, for which the teacher sent him to his home; that afterwards his father returned with him and had an interview with the principal of the school, in which the principal said that the school committee would not allow him to punish the plaintiff unless he said that he was willing to be punished, and, upon the plaintiff's refusing to say so, he told him "to go home, and that he would not have him in school unless he said he was willing to be punished." The father afterwards requested the teacher to state the grounds upon which the boy had been "excluded from school;" and received an answer which is set forth in the report. Thereupon, without any appeal to the school committee, this action was brought.

We are of opinion that the Superior Court rightly ruled that the action could not be maintained. The intention of the statute is to give a remedy to a child who is unlawfully excluded from school by the proper authorities, who in this matter represent the city or town. A teacher has no authority to exclude a child from school, unless he acts under the order of the school committee, of which there was no evidence in this case. The laws vest in the school committee the charge and superintendence

of the schools. They alone have the right to exclude any child from school.

If a teacher sends a child home from school, there is no hardship in requiring the parent to appeal to the committee. Unless the teacher is acting under some order of the committee, this is the only way of ascertaining whether the proper authorities, for whose action the city or town is made responsible, have excluded the child. On the other hand, to hold that, whenever a teacher sends a child home as a punishment, the parent may treat it as an expulsion, and sue the city or town, would lead to vexatious litigation and impair the discipline and usefulness of the schools. *Spear v. Cummings*, 23 Pick. 224. *Sherman v. Charlestown*, 8 Cush. 160. *Hodgkins v. Rockport*, 105 Mass. 475. *Learock v. Putnam*, 111 Mass. 499.

The plaintiff in this case therefore has failed to show an expulsion from school for which the city is liable under the statute.

Judgment on the verdict.

RUFUS COOK vs. JAMES GRAY & others.

Suffolk. March 9, 1881; March 7. — June 26, 1882.

A number of persons associated themselves together for the purchase of several tracts of upland and flats situated on the sea-shore, for the purpose of improvement and subsequent sales, and took a deed of the premises running to three of their number as trustees, and containing a detailed statement in fifteen articles of the trusts upon which the premises should be held. In these articles, the names of the purchasers and their respective interests were mentioned. It was then provided that the "trustees shall and may pay all lawful taxes and assessments thereon; represent the parties interested in all suits and legal proceedings relating to the premises in any court, and commence the same when necessary; make and execute all necessary agreements relating to said granted premises; employ counsel, and do all acts and things, and pay out all sums of money necessary and proper in the due execution and management of said property; and, in particular, may provide for proper drainage, and may determine all questions relative to the proper laying out of streets and ways, or building-lots, subject to the instruction hereinafter provided for." A subsequent article provided that the interest of the purchasers should be divided into sixty thousand transferable shares of the nominal value of a certain sum each; and that the beneficiaries should be styled "The B. Company." Another article provided

that, in case the trustees should find it necessary to raise and expend money before they should receive sufficient funds from sales, they should have authority to collect all necessary sums by assessment upon the shareholders of not more than two dollars per share; with authority to make sales of shares for non-payment of assessments. The last article was as follows: "Said trustees shall not, in behalf of the shareholders, incur liabilities which will not be covered by said assessment of two dollars per share and receipts from sale of company property." *Held*, that, by the true construction of the articles, the trustees were authorized to incur liabilities on behalf of the shareholders to the amount of at least one hundred and twenty thousand dollars.

Three persons holding land as trustees of an association composed of themselves and several other persons, called "The B. Company," entered into two contracts with the plaintiff, which, by the articles of the trust, they were authorized to make on behalf of the shareholders. Both of these contracts stated on their face that they were made by the trustees "as trustees of the B. Company;" and were both signed by these persons "as trustees" of the same company. By the first contract, the plaintiff was to construct a wharf "for said company on their land," on the line of a dock or canal "to be excavated for said company;" and "payments shall be made" at stated times. The second contract recited that the plaintiff agreed to construct a canal or dock "for said company on the company's land;" and the provision as to payments was substantially like that in the first contract. *Held*, that it was intended by these contracts to bind the company, and not the trustees personally, and that they were sufficient in form for that purpose; and that the addition of seals, being unnecessary, might be disregarded as surplusage.

If a person, who performs work for another under a special contract and is paid in part only for such work, is justified in abandoning the contract, he may recover the value of his work on a *quantum meruit*.

CONTRACT upon an account annexed for work and labor. Trial in the Superior Court, without a jury, before *Dewey, J.*, who found for the plaintiff, and reported the case for the consideration of this court; such judgment to be entered as the court might determine. The facts appear in the opinion.

The case was argued at the bar in March 1881, and was afterwards submitted on briefs to all the judges.

J. H. Bradley, I. S. Morse, A. Cottrell, J. F. Colby, C. Q. Tirrell & T. H. Wakefield, for the several defendants.

G. W. Park, for the plaintiff.

C. ALLEN, J. The trustees were authorized by the articles contained in the deed of trust to bind the shareholders by contracts like these entered into with the plaintiff. It appears that a considerable number of persons associated themselves together for the purchase of several tracts of upland and flats situated on the sea-shore, for the purpose of improvement and subsequent sales, and took a deed of the premises running to three of their

number as trustees, and containing a detailed statement, in fifteen articles, of the trusts upon which the premises should be held. In these articles, the names of the purchasers and their respective interests were mentioned; it was then provided that the "trustees shall and may pay all lawful taxes and assessments thereon; represent the parties interested in all suits and legal proceedings relating to the premises in any court, and commence the same when necessary; . . . make and execute all necessary agreements relating to said granted premises; employ counsel, and do all acts and things, and pay out all sums of money necessary and proper in the due execution and management of said property; . . . and in particular may provide for proper drainage, and may determine all questions relative to the proper laying out of streets and ways, or building-lots, subject to the instruction hereinafter provided for." A subsequent article provided that the interest of the purchasers should be divided into sixty thousand transferable shares, of the nominal value of twenty dollars each, and that the beneficiaries should be styled "The Boston Land and Wharf Improvement Company." Article 13 provided that, in case the trustees should find it necessary to raise and expend money before they should receive sufficient funds from sales, they should have authority to collect all necessary sums by assessment upon the shareholders of not more than two dollars per share; with authority to make sales of shares for non-payment of assessments. Article 15 was as follows: "Said trustees shall not, on behalf of the shareholders, incur liabilities which will not be covered by said assessment of two dollars per share, and receipts from sale of company property."

It thus appears that it was contemplated that the trustees should and must incur and pay certain expenses, not only for taxes and counsel fees, but in "the due execution and management of said property;" that in particular they might provide for proper drainage, and determine as to the proper laying out of streets, &c. Sales of the premises in parcels were obviously contemplated. Article 15, by a direct implication, authorizes the trustees, on behalf of the shareholders, to incur liabilities which would be covered by an assessment of two dollars per share upon all of the shares, and by the receipts from sales

of the company's property. These assessments would amount in all to the sum of \$120,000. There is no way in which it could be determined in advance how much money would be received from sales, and therefore the articles do not furnish the means by which any one could tell beforehand the exact extent of the authority intended to be conferred upon the trustees in this particular. There is no provision in the articles to the effect that the shareholders shall not be liable to creditors, who may in good faith have given credit to the company upon contracts made by the trustees, for an amount even in excess of the above-mentioned limitation upon their authority; and in view of the fact that the limitation of what will be covered by receipts from sale of company property is in its nature not capable of definite ascertainment at the time when it is contemplated that the liabilities will be incurred, there is room for the argument, at least, that Article 15 is to be considered as merely a direction to the trustees, and an expression of the understanding which the shareholders had among themselves, but that it was not intended to have the effect of exempting the shareholders from liability to third persons, to any amount for which such third persons might in good faith have given credit to the company, under contracts with the trustees. Such an argument would find support in the observations contained in *Lindley on Partnership* (4th ed.) 332-334, and the cases there cited. It is not necessary, however, in the present case to consider whether such liability would exist; but we are clearly of opinion that under Article 15 the trustees had authority to incur liabilities on behalf of the shareholders to an amount of at least \$120,000; and it is found as a fact, that all the liabilities incurred by the trustees, including the claim of the plaintiff, will not exceed that sum.

It is, indeed, contended by the defendants, that the effect of the articles is to limit the right of creditors to the particular fund which may be realized from the collection of assessments, the sale of shares for non-payment of assessments, and the sale of the company property; but this is obviously too narrow a construction of the articles. Creditors have no power to lay an assessment, or to collect it when laid, or to make sales of shares for non-payment of assessments; or in any way to compel the

trustees to do any of these things. The articles do not in terms provide that creditors shall be limited to those specific funds and such is not their reasonable construction. These articles though contained in a deed running to the trustees, must be presumed to have been prepared on behalf of the shareholders who acted together, and selected each other for associates, and made such provisions as they deemed sufficient and reasonable to procure a sufficient credit for their trustees, and to make it safe for others to give such credit within the limit fixed; and it must be assumed that they intended to fix the amount of the assessment as one element of the authority conferred upon the trustees, and not that creditors should take the risk of receiving their pay from a particular fund, the raising of which might be left to be determined upon thereafter, and over which they would have no control.

Such being the true construction of these articles, the trustees entered into contracts with the plaintiff, which were found to be proper and reasonable, for the development and improvement of the property. They were therefore such contracts as the trustees had authority to make, on behalf of the shareholders. Being made with sufficient authority to bind the shareholders the contracts are sufficient in form for that purpose. Both of them are stated on their face to be made by the trustees "as trustees of the Boston Land and Wharf Improvement Company." Both are signed by these persons "as trustees" of the same company. The insertion of the word "as" in the body of the contract, and after the signatures, has some significance in negating the supposition that the words which follow are to be treated as merely a *descriptio personarum*. By the first contract, the plaintiff is to construct a wharf "for said company, on their land," on the line of the dock or canal "to be excavated for said company." The provision for payments is not that the trustees will pay, but that "payments shall be made" at certain times. By the second contract, it is recited that it is proposed that the plaintiff shall construct a canal or dock "for said company, on the company's land," and the plaintiff agrees to do it: and the provision as to payments is substantially like that in the first contract. It is sufficiently plain that it was intended by these contracts to bind the company, and not the trustees

personally; and such was the practical construction put upon them by the parties. See *Cutler v. Ashland*, 121 Mass. 588; *Blanchard v. Blackstone*, 102 Mass. 343; *Whitney v. Wyman*, 101 U. S. 392. The unnecessary addition of seals may be treated as surplusage, and disregarded. *Blanchard v. Blackstone*, *ubi supra*. *Schmertz v. Shreeve*, 62 Penn. St. 457. *Purviance v. Sutherland*, 2 Ohio St. 478, 482, 484. *Human v. Cuniffe*, 82 Misso. 316. The work was done, under these contracts, for the company, and the plaintiff was paid in part, and, the latter portion of the estimates not being paid, he abandoned the work, and it is found as a fact that he was justified in doing so. Under these circumstances, he can recover the value of his work on a *quantum meruit*. *Fitzgerald v. Allen*, 128 Mass. 232. *Van Deusen v. Blum*, 18 Pick. 229. In the latter case, the unauthorized addition of a seal to the contract was held not to defeat the plaintiff's right to recover on a *quantum meruit*.

The plaintiff is therefore entitled to recover, and the entry must be,

Judgment affirmed.

JOHN MULDOON, administrator, vs. MARGARET MULDOON
& others.

Suffolk. January 17; March 30. — June 27, 1882.

An administrator cannot maintain a bill in equity to obtain the instructions of this court as to the distribution of the proceeds of real estate, sold by him under a license from the Probate Court, until the surplus remaining on the final settlement of his accounts in that court has been ascertained.

FIELD, J. Owen Muldoon died intestate, September 29, 1880, leaving no issue. This bill in equity was filed, March 16, 1881, by the administrator of his estate, who is also one of the heirs at law, asking for instructions as to the distribution between the widow and the heirs at law of the proceeds arising from the sale of the land of the intestate, and remaining after the payment of a debt secured by a mortgage upon the land. The sale was made by the administrator pursuant to a decree of the Probate Court; and the widow joined in the sale and conveyance,

"without prejudice however to her rights in the proceeds of the sale," and the whole purchase money was paid to the administrator. It must be assumed that the administrator was authorized to sell the whole of the land of his intestate, pursuant to the Gen. Sts. c. 102, § 4.

The result of such a sale is to pass the title to the purchaser of the whole interest in the land which the law authorizes an administrator to sell, and to leave the proceeds remaining after paying the debts of the estate to be distributed according to law. Gen. Sts. c. 102, §§ 6, 44. In this case, the sale was made before the time had expired within which the widow must elect to take dower, and hence it was then uncertain whether she would so elect, or would claim the estate in lieu of dower given by the Gen. Sts. c. 90, §§ 15, 16.

It was further considered uncertain what would be her rights in the land, if she failed to elect to take dower and claimed an estate in lieu of dower. See St. 1880, c. 211. It was for these reasons that the widow joined in the conveyance.

It thus appears that the rights and duties of the administrator are to be determined partly by his position as an administrator holding for distribution the proceeds of a sale of land made in pursuance of a decree of the Probate Court, and partly by his relations by contract with the widow.

In so far as he holds the proceeds simply as administrator, the question of their distribution is for the determination of the Probate Court, and any legal questions involved can come before this court on appeal. *Loring v. Steineman*, 1 Met. 204. *Atherton v. Corliss*, 101 Mass. 40. *White v. Weatherbee*, 126 Mass. 450. *Pierce v. Prescott*, 128 Mass. 140. Indeed, it is one of the conditions of the bond of an administrator that he shall "pay any balance remaining in his hands, upon the settlement of his accounts, to such persons as the Probate Court shall direct." Gen. Sts. c. 94, § 2. If the rights and duties of the administrator as such are in any way affected by his agreement with the widow above recited, this gives no ground for a bill for instructions, since the question of the effect of that agreement in determining the proper distribution of the proceeds of the sale is properly cognizable by the Probate Court, and may be brought before this court by appeal.

In so far as the administrator has brought himself under personal obligations to the widow by a personal contract with her, and by receiving property in his personal capacity which may belong to her, the amount of which is uncertain by reason of the uncertainty of the law, there is no ground for a bill for instructions, as the obligations have been voluntarily assumed by the administrator in his personal capacity, and are in no way incidental to the performance of his duties as administrator. See *Sprague v. West*, 127 Mass. 471.

It is unnecessary to determine whether a bill in equity in this court by an administrator praying for instructions as to the distribution of the assets of an intestate estate can under any circumstances be maintained. Such a bill was entertained in *Bigelow v. Morong*, 103 Mass. 287, but the question of jurisdiction was not raised or considered. In that case, it does not appear that the administrator had personally any interest in the fund to be distributed, or that he had not finally settled his accounts in the Probate Court.

In *Stevens v. Warren*, 101 Mass. 564, the administrator held the proceeds of a policy of life insurance, which were assets in his hands for the benefit of one defendant as next of kin, unless the other defendant was entitled to receive these proceeds by virtue of an assignment of the policy made in the lifetime of the assured. It was a suit, not for the determination of the proper distribution of the assets of the estate, but for the determination of what were assets and what were not. The court say that the plaintiff "is not only liable to be harassed by conflicting claims; but exposed to the risk of being required to settle his accounts, and distribute or pay over the fund as administrator, before his liability to the other claimant is brought to a determination at law. The settlement of the estate is liable to be delayed by reason of a dispute affecting a considerable portion of the supposed assets. In such a case the administrator may properly ask the direction and protection of the court," and *Dimmock v. Bixby*, 20 Pick. 368, and *Treadwell v. Cordis*, 5 Gray, 341, are cited. From the opinion it is to be inferred that the policy was payable to the assured, who was the intestate, and to his personal representatives, and that the administrator was the person who in law was entitled to receive the amount of the insurance.

Whether he held the money so received as assets of the estate, or for the benefit of the assignee, depended upon the validity of the assignment.

Dimmock v. Bizby, *ubi supra*, was a bill in equity brought by trustees praying the direction of the court in the execution of a trust.

Treadwell v. Cordis, *ubi supra*, was a bill in equity brought by executors asking the direction of the court in the execution of trusts arising under a will.

In *Putnam v. Collamore*, 109 Mass. 509, which was a bill in equity for instructions, brought by an administrator *de bonis non* with the will annexed, who was also trustee under the will, the court say, in reference to the ground on which such a bill can be maintained, that "The principal requisites are: 1. The fiduciary possession of a fund, of which some disposition is required to be made presently; 2. Conflicting claims, or the probability that such may arise; 3. No adequate means of determining them otherwise, so as effectually to protect the trustee from the risks of further liability or controversy."

The jurisdiction of this court as a court of equity over bills brought for instructions in regard to the execution of trusts, is undoubted; but in the case at bar, so far as the administrator holds funds derived from a sale of the real estate of the intestate made by him under the decree of the Probate Court, he does not hold them under any trust strictly so called, but he holds them to be disposed of in accordance with the general laws of the Commonwealth; and the settlement of his accounts and a decree of distribution in the Probate Court will determine all the conflicting claims to such funds that have arisen, or may hereafter arise, and effectually protect him from the risks of future liability.

Our statutes have established an elaborate system of procedure for the administration of the estates of deceased persons. The jurisdiction is in the probate courts. The statutes confer on those courts authority to determine all claims to a distributive share in the assets of an intestate estate. "The Supreme Judicial Court shall be the supreme court of probate, and have appellate jurisdiction of all matters determinable by the probate courts and the judges thereof, except in cases in which other

provisions are specially made." Gen. Sts. c. 117, § 7. Pub. Sts. c. 156, § 5.

This court is not a court of probate of original jurisdiction. The superintending and revising power of this court over probate courts is by appeal. *Peters v. Peters*, 8 Cush. 529.

Without deciding the question, which was not raised or considered in *Bigelow v. Morong*, *ubi supra*, namely, whether a bill in equity can under any circumstances be maintained by an administrator for the purpose of obtaining the instructions of this court as to the distribution of the assets of the estate of his intestate, we must hold that, in reference to the proceeds of real estate sold by an administrator under a license from the Probate Court, no such bill can be maintained before the accounts of the administrator have been finally settled in the Probate Court, and "the surplus of the proceeds remaining on the final settlement of the accounts" has been ascertained. See Gen. Sts. c. 102, § 44. Until that is done, the amount of the fund to be distributed is uncertain. See *Proctor v. Heyer*, 122 Mass. 525.

Without expressing any opinion upon the rights of the different parties respondent in this case, the

Bill must be dismissed.

The case was argued at the bar in January 1882, and was afterwards submitted on briefs to all the judges.

J. A. Maxwell, for the heirs at law.

J. Willard, (*C. Steere* with him,) for the widow.

JAMES H. REED & another vs. HENRY E. JONES & another.

Suffolk. Nov. 17, 1880; Nov. 9, 1881; May 6. — June 28, 1882.

The condition of a mortgage of land contained the provisions that the mortgagor should pay to the mortgagee a certain sum in five years, with interest at a certain rate, payable semiannually; that the mortgagor should also pay all taxes and assessments upon or on account of the mortgaged premises; that the mortgagor might at his option pay the whole or any part of the mortgage debt at any time within the five years; and that the mortgagee would at any time release to the mortgagor any portion of the premises upon payment of a certain sum per foot for the portion so released, which amount should be indorsed upon the mortgage note. After default, not only as to the payment of the interest and taxes, but also of the principal, a person, who bought the land subject to the mortgage, brought a bill in equity against the mortgagee to compel the release of a portion of the mortgaged premises. No demand for such release, nor tender of the stipulated price per foot for the same, was made until more than two years after the expiration of the time for the payment of the principal; and the mortgagee had not by any act waived or deprived himself of any rights under the mortgage. *Held*, that the bill could not be maintained.

BILL IN EQUITY, filed August 2, 1879, by James H. Reed and William A. Low against Henry E. Jones and Isaac Pratt, Jr., trustees under the will of David Morrison, deceased, for the specific performance of an agreement by the defendants to release a certain parcel of land from a mortgage executed by the grantor of the plaintiffs to the defendants, and to restrain the defendants from selling said land under a power of sale contained in the mortgage. The case was referred to a master, who found the following facts:

On February 27, 1872, the defendants conveyed to Eben Sears a parcel of land in Boston, containing about two hundred and sixty-two thousand square feet, for the sum of \$26,201. Sears paid \$5000 in cash, and gave his note for the balance, secured by a mortgage of the land, dated February 27, 1872, which contained the following condition:

“Provided, nevertheless, that if the said grantor, or his heirs, executors or administrators, shall pay unto the said grantees, or their executors, administrators or assigns, the sum of twenty-one thousand two hundred and one dollars in five years from the day of the date hereof, with interest on said sum at the rate of seven per centum per annum, payable semiannually, (but it is hereby

expressly agreed that the said mortgagor may at his option at any time within said five years pay the whole or any part of said sum,) and the said mortgagees, their executors, administrators and assigns, hereby agree with said mortgagor, his heirs and assigns, that they will at any time release to the said mortgagor, his heirs and assigns, any portion of the said premises upon the payment to said mortgagees, their executors, administrators and assigns, at a sum not exceeding the rate of twelve cents per foot for the portion so released, which amount shall be indorsed upon the mortgage note, and also pay all taxes and assessments levied or assessed upon or on account of the said premises: then this deed, as also a certain promissory note bearing even date with these presents, signed by said Eben Sears, whereby for value received he promises to pay the said grantees, or order, the said sum and interest at the times aforesaid, shall both be absolutely void to all intents and purposes." The mortgage also contained the usual power of sale.

On March 5, 1872, Sears conveyed the land in question to the plaintiff Reed and to William F. Humphrey, subject to the mortgage; and on June 23, 1874, Humphrey conveyed one undivided half of the land to the plaintiff Low, subject to the mortgage, one half of which Low agreed to pay, and to hold the grantor harmless from.

On June 14, 1876, the defendants, on being paid the rate per foot stated in the condition of the mortgage, released to the plaintiffs ten thousand five hundred and forty-eight feet of land, with a house thereon, and on December 7, 1876, made a similar release of seventeen thousand two hundred feet of land, upon which was also a house.

Before the maturity of the mortgage, the plaintiffs staked off the land which they seek to have released from the mortgage, and built a house thereon. The defendant Pratt knew of the building of the house, but not of the staking off of the land.

On February 27, 1877, when the mortgage note matured, there was due and unpaid upon it \$17,871.16 of the principal, and \$662.18 of the interest; and the taxes for the year 1876 on the land had not been paid.

On April 25, 1878, \$17,871.16 of the principal of the note, together with \$2114.70, interest thereon, and taxes amounting

to \$462.61, being unpaid, the defendants entered for condition broken, and duly filed a certificate of their entry in the registry of deeds. At this time, the house on the land which the plaintiffs seek to have released from the mortgage was in possession of a tenant of the plaintiffs. He remained in possession until January 1, 1879. From that time until May 1, 1879, the premises were unoccupied, and then the plaintiffs let the same to another tenant. The defendants did not attempt to collect any rent therefor, or to exercise any actual control thereof, until some time in June 1879, when they undertook to collect the rent. The defendants advertised the entire estate included in the mortgage, except the two parcels released on June 14 and December 7, 1876, for sale, by public auction, on August 12, 1879, for breach of the condition of the mortgage.

The master further found, that the plaintiff Reed was at all times, after the house in question was built, able and ready to pay for the release of the premises in question from the mortgage, but that the plaintiffs had not, at the date of the maturity of the mortgage note, notified the defendants of their readiness to pay the amount required to be paid to release the premises from the mortgage; and that the defendants had not by any acts of theirs waived or deprived themselves of any of their rights under their mortgage.

The master also reported the evidence bearing upon the question whether the plaintiffs made a sufficient tender in July 1879, his finding being that the tender was not sufficient. This evidence it is not necessary now to state.

The case was heard before a single justice of this court, who ordered a decree to be entered in favor of the plaintiffs, on their paying the sum of \$1200 with interest at the rate of seven per cent, and the taxes due on the premises in question. The defendants appealed to the full court.

The case was argued at the bar in November 1880, and was afterwards submitted on briefs to all the judges.

T. P. Proctor, for the defendants.

G. H. Kingsbury, for the plaintiffs.

C. ALLEN, J. The substance of the provisions contained in the condition of this mortgage is as follows :

1. The mortgagor is to pay to the mortgagee the sum of \$21,201 in five years, with interest at the rate of seven per cent per annum, payable semiannually.

2. The mortgagor is also to pay all taxes and assessments upon or on account of the mortgaged premises.

3. The mortgagor may at his option pay the whole or any part of the mortgage debt at any time within the five years.

4. The mortgagee will at any time release to the mortgagor any portion of the premises, upon payment of a sum not exceeding the rate of twelve cents per foot for the portion so released, which sum shall be indorsed upon the mortgage note.

The last provision has been treated by the parties as if the sum contemplated was at the rate of precisely twelve cents per foot, and no question arises upon the phraseology "not exceeding" twelve cents per foot.

In order to determine the true construction of these various stipulations, and especially of the last, in its relation to the others, and whether it is an independent or dependent stipulation, the whole instrument is to be taken together, and reference is to be had to its objects and purposes. *Cadwell v. Blake*, 6 Gray, 402. *Knight v. New England Worsted Co.* 2 Cush. 271, 286. *Howland v. Leach*, 11 Pick. 151.

Looking at this instrument in view of this general rule, it is apparent that the general purpose of the mortgage is to make a security for the mortgage debt. This debt is due at a specified time, with the privilege on the part of the mortgagor of paying the whole or any part of it before it becomes due. If, for example, the value of the premises increases, either from a general rise in the value of real estate, or by reason of increasing demand for dwellings or for business purposes in the neighborhood, or of special improvements or additions upon this particular estate, the mortgagor retains the opportunity to go into the market and secure a loan on better terms if he can, and thus pay off the mortgage debt. In addition to this, he may also call for releases of portions of the mortgaged premises from time to time, upon making a stipulated payment therefor; thus enabling himself to make sales of small lots to purchasers, and to convey a clear title. It is to be observed, however, that this stipulated payment is the same in amount, at whatever time it may be made

and the release called for. That is to say, whether the mortgagor demands such release at the end of six months, or at a later period, he is in either case to pay at the rate of twelve-cents a foot. There is a further provision that the sum so paid shall be indorsed upon the mortgage note. This excludes the idea that it can be appropriated towards the payment of taxes or assessments. The provision does not in terms specify that such payment shall be so indorsed in reduction of the principal of the note, and that it shall not be applied upon the interest; but this also is perhaps to be inferred. The mortgagor is at all events to pay certain sums; namely, the semiannual interest, and taxes and assessments, and the principal of the debt at its maturity. He reserves to himself the privilege of paying other sums. The payment of the former is a positive duty. The payment of the latter is a privilege which he secures to himself for his own convenience or advantage. If, under these provisions, even within the five years, the mortgagor were in default in the payment of interest or taxes, it would be a grave question whether a court of equity would assist him, during the continuance of such default, to obtain a release of any portion of the mortgaged premises upon the payment merely of the stipulated rate per foot. But that question does not arise here. In the present case, the time for the payment of the whole of the principal debt has expired, and the mortgagor is in default as to the payment, not only of the interest and taxes, but also of the principal. No demand for a release of the portion of the mortgaged premises now in controversy, nor tender of the stipulated rate per foot for the same, was made until more than two years after the expiration of the time for the payment of the principal. There is no averment or proof of any act done or assurance given by the defendants within the five years, which would give the mortgagor a right to suppose that his privilege of demanding such release would be extended after a failure to pay the principal debt at its maturity. The master finds that the defendants have not, by any acts of theirs, waived or deprived themselves of any rights under their mortgage. The plaintiffs do not now offer to pay the debt, or the arrears of interest or taxes; but seek to obtain a release of a particular portion of the premises, without such payment. But a majority of the court are of opinion,

that, under these circumstances, the mortgagor is not entitled to avail himself of this privilege. If he were, he might demand a release of the most desirable and valuable selected portions of the premises, upon the payment of only twelve cents per foot, and the whole amount so paid might be less than the unpaid interest and taxes; and leave the whole principal of his debt unpaid, and the mortgagee's security for its payment greatly impaired. The provision giving to him the privilege of obtaining such release, upon such terms, is not an independent stipulation, which he can have the aid of a court of equity in enforcing while he is in such default, and while he disregards all the promises made by him in the same contract. See *Butman v. Porter*, 100 Mass. 337; *Marble Co. v. Ripley*, 10 Wall. 389, 358; *Colson v. Thompson*, 2 Wheat. 336; Story Eq. Jur. §§ 736, 771; Chit. Con. (11th Am. ed.) 1084.

The plaintiffs, as assignees of the equity of redemption, took their title with notice of what the mortgagees were entitled to receive, and subject to the payment of the sums stipulated for in the condition, and their equity is no greater than that of the original mortgagor.

This view of the true construction of the condition of the mortgage renders it unnecessary to consider the other questions argued. *Bill dismissed.*

DANIEL J. MURPHY vs. BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. March 2, 1881. — June 28, 1882. DEVENS, W. ALLEN & C. ALLEN, JJ., absent.

If a railroad corporation so constructs a private crossing over its track, at grade, in a city, that it is held out as a suitable place for foot passengers to cross, it is liable in damages for an injury sustained by a person, using due care, who is thereby induced to enter upon the crossing, and is injured by the negligence of the corporation or its servants. And if the plaintiff at the time he was injured was on that part of the crossing so constructed, it is no defence to an action by him against the corporation for such injury, that he entered upon the crossing at a place not so constructed.

A refusal to give an instruction based upon a part of the evidence only, affords no ground of exception.

If a railroad corporation so constructs a private crossing over its track, at grade, in a city, as to hold it out as a suitable place for foot passengers to cross, it is bound to use reasonable precautions to protect them while so crossing.

TORT for injuries sustained by the plaintiff by being struck by the defendant's cars. Trial in this court, before *Morton, J.*, who allowed a bill of exceptions, in substance as follows:

The plaintiff was struck by the defendant's cars, while he was crossing its tracks between South Street and Albany Street, both largely travelled public streets and thoroughfares, in Boston, at a place where a public street called Harvard Street, which ended at Albany Street, would have passed if extended to South Street. Said crossing was between, and a mode of access to, two freight-houses of the defendant.

It was admitted that this crossing was not a public way, and that the defendant had planked the same and kept a flagman there, and it appeared that large numbers of vehicles and men on foot crossed there without prohibition. The jury viewed the premises, and the plaintiff contended that it appeared from this view, and the evidence in the case, that the defendant had so arranged this crossing with planking and paving as to make it an apparent continuation of Harvard Street from Albany Street to South Street, and thus held it out to the world as a public crossing, and induced plaintiff to cross there. The plaintiff was a pupil at a public school, and crossed the tracks on the way from his home to said school, as he had frequently done before.

The plaintiff contended that the defendant was negligent in backing its train around the curve over the crossing without proper warning or precaution against accident, in omitting to provide another flagman to guard the crossing, in giving the flagman who was there too much other work to attend to, and in the failure of the flagman to attend to his duty. The evidence was conflicting as to where the plaintiff crossed and was injured.

The defendant requested the judge to instruct the jury as follows: "1. Such inducement could only relate to the place or section thus planked and paved, and if the plaintiff, without any action or direction on the part of the defendant or its servants, passed over the tracks elsewhere than on such place or section, and was struck on the tracks, and not upon that place or section,

or would not have been struck if he had kept wholly upon the planking or paving, he cannot recover in this action. 2. If the only inducement or invitation to cross the tracks, at or near the place where the plaintiff was injured, was by fitting the crossing with such planks and paving as would enable persons transporting goods to and from the defendant's freight-houses adjoining to pass conveniently, and placing one flagman there and not objecting when other persons and vehicles also crossed, — these facts alone are not evidence of an invitation or inducement to persons who had no occasion to go to those freight-houses for goods or business, and especially are not evidence, without something else, of any invitation or inducement to young boys on their way to a school, who could conveniently reach the same by another somewhat longer way, to come over such crossing to such school. 3. If the only invitation or inducement given to the plaintiff to cross the tracks was by paving and planking the crossing, and placing one flagman, charged with certain duties, at that crossing, and permitting vehicles and footmen to cross over it, this invitation or inducement was only to cross on the pavement and planking laid down, and with such protection as that one flagman could conveniently and reasonably give in the performance of those duties; and that no person, acting on that alleged inducement or invitation, had a right to hold the corporation responsible for any want of due care in not providing additional protection. 4. Any action or arrangement of the defendant, in regard to the alleged crossing, by planking, paving, permitting vehicles or persons to cross, leaving, placing or omitting to place any sign designating the crossing as dangerous, as a private way or a street, or stationing one flagman there, if it operated or could operate as an inducement or invitation to cross at all, could operate only as an inducement or invitation to use the crossing solely in the manner, over the ground, and with the protection actually provided and arranged, set apart and given by such action or arrangement, and did not create any obligation or duty to provide additional protection by another flagman or otherwise, or protection over or upon any other ground or place."

Upon the matters embraced in these requests, the judge instructed the jury, that it was for them, on all the evidence, to

say whether the defendant had held out this crossing as a proper place for all persons, including the plaintiff, to cross, and thus, by its invitation, induced the plaintiff to cross there, and whether the defendant had laid out the crossing with planking and other appliances in such a way as to hold it out to the world as a suitable railroad crossing, so that it would appear to any one to be a continuation of Harvard Street and a suitable place to cross; that the question was whether it was so constructed as that it was held out as a suitable place for foot passengers; that if it was held out as a suitable crossing for foot passengers, it would only permit foot passengers to use the crossing to the same extent to which the railroad had laid it out and prepared it for use; it would not allow foot passengers to go either on one side or the other of the planking or crossing as prepared for use by the railroad, and cross the track in any other direction or in any other mode; it would at most be only an invitation or permission for them to cross upon the crossing as laid out by the railroad company, and if the plaintiff went off the crossing on the track, and was walking or standing upon the track when he was struck, he could not recover; that the questions of the plaintiff's care and the defendant's negligence were for the jury; that it was for the jury to decide what the railroad company, if it had thrown this crossing open for the use of the public, and invited the public to use it, ought reasonably to be required to do at that place, considering all the circumstances, in order fairly to protect the public; and, if it did not do that, it would be guilty of negligence which would render it liable; and that the plaintiff could not recover unless he satisfied the jury that he was acting rightly, in the use of a proper degree of care, and that the injury was occasioned by some negligent act on the part of the defendant. The judge refused the several requests of the defendant, except so far as they were covered by the foregoing instructions.

The jury returned a verdict for the plaintiff in the sum of \$5000; and the defendant alleged exceptions.

G. S. Hale, for the defendant.

W. W. Blackmar, for the plaintiff.

FIELD, J. The instructions given were in accordance with the law as laid down in *Sweeny v. Old Colony & Newport Railroad*,

10 Allen, 368. In that case there was evidence that the flag-man made a signal with his flag, indicating that it was safe to cross; in other material respects the cases are similar. If there was evidence sufficient for the jury to find that the defendant held out the crossing as a suitable place for foot passengers to cross, so that the plaintiff may be said to have attempted to cross as he did, by the inducement or invitation of the defendant, then the instructions were correct. But if the plaintiff attempted to cross merely by the license or permission of the defendant, then there must be a new trial.

The distinction between an inducement or invitation, on the one hand, and a license or permission, on the other, was somewhat elaborately discussed in the opinion in *Sweeny v. Old Colony & Newport Railroad*. A single extract from that opinion is as follows: "It cannot in any just view of the evidence be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city, (which are much frequented thoroughfares,) and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such." That case, as the court say, did not rest on these facts alone, but we think this is a correct statement of the law, and the authorities are cited in that opinion.

The exceptions in this case do not purport to give all the instructions which the court gave, but only the instructions upon the subjects embraced in the request of the defendant; neither do they purport to give all the evidence upon the question whether the defendant corporation had held out this crossing as

a highway, and thus induced the plaintiff to use it as such; but enough appears in the exceptions to warrant the jury in finding that it had.

The court gave in substance all that is contained in the first request of the defendant, unless the words "or would not have been struck if he had kept wholly upon the planking or paving" be taken to mean that the plaintiff cannot recover, although struck while on the planking or paving, if at any time he had been off the planking or paving while crossing, and if his position on the planking and paving, if he had not been off, would have been such that he would not have been struck. If these words mean this, they ought not to have been given. The manner in which the plaintiff crossed the tracks may be evidence upon the questions whether he was in the exercise of due care, and whether the defendant exercised due care toward him; but, apart from this, it was no defence to prove that, at some time before the accident, the plaintiff had been where he had no right to be, or that, if the plaintiff had taken some other course, he would not have been struck.

The second request relates only to a part of the evidence, and the court was not bound to give instructions as to the effect of a part of the evidence.

The third and fourth requests in part were given as follows: "that if it was held out as a suitable crossing for foot passengers, it would only permit foot passengers to use the crossing to the same extent to which the railroad had held it out and prepared it for use; it would not allow foot passengers to go either on one side or the other of the planking or crossing as prepared for use by the railroad, and cross the track in any other direction or in any other mode." The remainder of these requests, to the effect that, if the facts set out could operate as an invitation or inducement, they could only operate as an invitation or inducement to use the crossing with the protection actually provided and arranged, and did not create any obligation or duty to provide additional protection, was rightly refused, and the instructions given in place thereof were correct. *Bradley v. Boston & Maine Railroad*, 2 Cush. 539. *Linfield v. Old Colony Railroad*, 10 Cush. 562.

If the defendant held this out as a public crossing, and thus induced or invited the public to use it as such, it was bound to use reasonable precautions to protect the public when using it under this inducement or invitation. *Exceptions overruled.*

EDWARD F. CHAPIN vs. JOHN HALEY.

Suffolk. March 4, 1881. — June 28, 1882. DEVENS, W. ALLEN & C. ALLEN, JJ., absent.

At the trial, in the Superior Court, of charges of fraud, filed under the Gen. Sts. c. 124, § 31, the jury returned a verdict of guilty on several of the charges. On the defendant's motion for a new trial, the judge set aside the verdict as to some of the charges, and, on the plaintiff's motion, ordered these charges to be stricken from the record. *Held*, that the defendant had no ground of exception. *Held, also*, that it was not open to the defendant to contend in this court that the evidence admitted under the charges so stricken out might have improperly influenced the jury in rendering their verdict on the other charges, he not having asked for a ruling limiting the evidence admitted under each charge.

A charge of fraud, filed against a person upon his application to take the oath for the relief of poor debtors, alleging that the defendant "hazarded and paid the sum of," naming it, "in a certain unlawful game played with cards and called draw poker or bluff," and that the defendant "did hazard and pay the said sum," naming it, "in said gaming as aforesaid, which is prohibited by the laws of this Commonwealth," sufficiently alleges that the defendant had hazarded and paid money in some kind of gaming prohibited by the laws of the Commonwealth.

A charge of fraud, filed against a person upon his application to take the oath for the relief of poor debtors, alleged that he hazarded and paid a sum named in a certain unlawful game played with cards and called draw poker. At the trial, the judge instructed the jury "that if they found the game of draw poker, as described by witnesses, to be a game of chance on which money was hazarded upon the kind of cards held by the respective players, or by betting upon the hands so held, and if chips redeemable in money were used by the players in place of money, then it was gaming prohibited by the laws of this Commonwealth." *Held*, that the defendant had no ground of exception.

CHARGES OF FRAUD, filed under the Gen. Sts. c. 124, § 31, upon the defendant's application to take the oath for the relief of poor debtors. The first and fifth charges, which need only now be stated, were as follows:

"First. That on or about the first day of January 1877, which was after the debt in this action was contracted, the said

Haley hazarded and paid the sum of one hundred and twenty-five dollars in a certain unlawful game played with cards, and called draw poker or bluff," in a certain place described, "and that the said Haley did hazard and pay the said sum of one hundred and twenty-five dollars, in said gaming with cards as aforesaid, which is prohibited by the laws of this Commonwealth."

The fifth charge differed from the first only in the amount charged to be hazarded, and the time and place of such gaming. The time was alleged to be "in the month of December 1876," and the amount was alleged to be thirty dollars.

At the hearing before the magistrate, the defendant was found guilty on some of the charges; and he appealed to the Superior Court. The case was tried in that court, before *Gardner, J.*, who allowed a bill of exceptions, which, so far as material to the points decided, was in substance as follows:

The defendant moved to dismiss the charges on the ground that they did not allege that the defendant had hazarded and paid money in some kind of gaming prohibited by the laws of the State; but the judge overruled the motion.

The plaintiff testified that, in the latter part of 1874, he lent the defendant \$1150, and took from him a promissory note of that amount signed by Snow, Rollins and Company, of which firm the defendant was a member; that the defendant at different times paid \$575, and on July 19, 1876, gave him a new note signed by said firm for \$575, dated July 19, 1876, on four months; that he afterwards paid him \$100, which was indorsed on said note; and that the execution on which the defendant was arrested issued upon a judgment dated May 21, 1877, upon said note of \$575.

The plaintiff testified upon the first charge, that on or about January 1, 1877, the defendant played draw poker with several other persons; and that, at said time, the defendant got from one Appleberry certain chips, and gave said Appleberry \$125 therefor, seventy-five of which he took from his own pocket and fifty of which he got at said time from one Barnard; and that, at said time, the defendant lost all said chips while so playing draw poker. Evidence was introduced tending to show that the chips were of ivory, and were used at the play instead of money,

and were redeemable by Appleberry at the price paid for them. The plaintiff also testified, upon the fifth charge, that in December 1876, he saw the defendant playing draw poker, buying chips for thirty dollars and losing said chips.

The defendant offered no evidence, and upon the above evidence asked the judge to rule that he could not be found guilty in this action; but the judge refused so to rule.

The defendant also asked the judge to rule that, so far as concerned this action, the debt was contracted on July 19, 1876; but the judge refused so to rule. The defendant asked the judge to rule that he could not be found guilty on these charges and evidence, inasmuch as the charges alleged that the debt was contracted and the cause of action accrued for money lent by the plaintiff to the defendant in December 1874, and the evidence was of a debt contracted July 19, 1876, and a cause of action accrued at the maturity of said note. The judge refused so to rule. The jury were instructed that if they found the game of draw poker, as described by witnesses, to be a game of chance on which money was hazarded upon the kind of cards held by the respective players, or by betting upon the hands so held, and if chips redeemable in money were used by the players in place of money, then it was gaming prohibited by the laws of this Commonwealth; and if they found that since the debt was contracted, or the cause of action accrued, the defendant had hazarded and paid money to the amount of \$100 or more in such gaming, then they might find the defendant guilty; and also instructed them that the cause of action accrued when the note on which judgment was recovered matured, at the end of three days of grace following four months from its date; but that the debt was contracted when the \$1150 was borrowed by the defendant of the plaintiff; with other instructions as to the burden of proof, and the application of the evidence to the charges not stricken out, which were not excepted to.

The jury returned a verdict of guilty on the first, second, fourth, fifth and sixth charges, and, by direction of the judge, not guilty on the eighth count. Upon motion for a new trial, the judge set aside the verdict finding the defendant guilty on the second, fourth and sixth charges, because of the plaintiff's participation with the defendant in the games set out in those

charges, and overruled the motion as to the first and fifth charges.

On motion of the plaintiff, the second, fourth, and sixth charges were subsequently stricken from the record. The defendant alleged exceptions.

H. N. Shepard, for the defendant.

A. Russ, for the plaintiff.

FIELD, J. The exceptions of the defendant to the order of the Superior Court striking from the record the second, fourth and sixth charges cannot be sustained. The granting of such an order was within the discretion of that court, and is not subject to exception.

The defendant complains, in his argument here, that the evidence admitted under these charges may have improperly influenced the jury in rendering their verdict on the other charges. But it was the right of the defendant to ask the justice presiding at the trial to rule distinctly upon the admissibility of evidence under each charge, and to take exception if any erroneous ruling was made. Having neglected to do this, there is no exception before this court, except the general exception to the granting of the order.

The jury returned a verdict of guilty on the first, second, fourth, fifth and sixth charges; but as the second, fourth and sixth charges have been stricken from the record, there remains only a verdict of guilty on the first and fifth charges.

The defendant moved to dismiss these and other charges, for the alleged reason that they did not aver that the defendant had hazarded and paid money in some kind of gaming prohibited by the laws of the Commonwealth. The first charge alleges that the defendant "hazarded and paid the sum of one hundred and twenty-five dollars in a certain unlawful game played with cards, and called draw poker or bluff," "and that the said Haley did hazard and pay the said sum of one hundred and twenty-five dollars in said gaming as aforesaid, which is prohibited by the laws of this Commonwealth." The fifth charge alleges, in the same manner, the hazarding and paying the sum of thirty dollars. The reason given for dismissing these charges is not supported by an examination of the charges themselves, and the motion was rightly overruled.

The refusal of the presiding justice to rule that the debt was contracted on July 19, 1876, as requested by the defendant, and the ruling that the debt was contracted when the \$1150 was borrowed, have become immaterial, since either date is before the gaming proved under the first and fifth charges.

The defendant asked the presiding justice to rule that, on the evidence recited in the exceptions, the defendant could not be found guilty; which request was refused. It is contended that this ruling was erroneous, because the games described by the plaintiff's witnesses are not gaming prohibited by the laws of the Commonwealth. No error appears in the instructions to the jury upon what constitutes gaming prohibited by the laws of the Commonwealth, and the evidence was sufficient to warrant the jury in finding a verdict of guilty on the first and fifth charges. Gen. Sts. c. 85. *Babcock v. Thompson*, 3 Pick. 446. *White v. Buss*, 3 Cush. 448. *Commonwealth v. Taylor*, 14 Gray, 26. *Commonwealth v. Gourdier*, 14 Gray, 390.

Exceptions overruled.

DANIEL McKINNEY & others vs. ARCHIBALD WILSON.

Suffolk. November 16, 1881. — June 28, 1882.

To maintain an action for breach of a contract to pay for certain goods purchased by the plaintiff for the defendant, if the goods are sent to a third person, the plaintiff must show either that such person was the agent of the defendant to receive the goods, or that some delivery or offer to deliver was made to the defendant by such person or by some one in behalf of the plaintiff.

In an action by A. against B., to recover the price of certain goods bought by A. on B.'s account and at his request, it appeared that A. sent the goods to a third person instead of to B. *Held*, that B. was entitled to put in evidence a letter to this third person from one with whom A. testified that he left the bill of lading of the goods to send to such third person, and who took full charge of the matter.

In an action pending in Suffolk county in this Commonwealth, a commission was issued to take a deposition in a foreign country. The certificate of the magistrate annexed to the deposition was headed "State of Massachusetts, Suffolk ss." *Held*, on the issue whether the deposition was taken in the foreign country or in Suffolk county, that it was competent for the judge before whom the case was tried to find that it was taken in the foreign country from

evidence that the envelope in which the deposition was received bore the post-mark and postage-stamp of such foreign country.

Under the Gen. Sts. c. 131, § 31, the Superior Court has power to make a rule, that, when a deposition is taken and certified by any person purporting to be an officer authorized by the commission to take the deposition, "if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting."

CONTRACT in two counts, with a count in tort. The first count alleged that the plaintiffs, at the defendant's request, purchased for him ten horses and delivered them to him at Glasgow, but the defendant refused to pay the plaintiffs the amount of the prices paid by them for the horses, with charges and commissions, as he had promised. The second count was on an account annexed. The third count was in tort for the conversion of the horses. Trial in the Superior Court, before *Putnam, J.*, who allowed a bill of exceptions, in substance as follows:

The plaintiffs are copartners doing business in Boston, and the defendant is a resident of Glasgow, Scotland. The plaintiffs offered evidence tending to show that on June 5, 1880, they received from the defendant, at Glasgow, a telegram, signed "Wilson, 130 London Street," directing them to send ten horses at once; that the plaintiffs immediately began purchasing horses for the defendant, and on June 18 they had ten horses ready to ship to the defendant at Glasgow; that on that day Bernard McKinney, one of the plaintiffs, went to the National Bank of Brighton, and told one Kingsley, the president, that he wished to draw a draft on the defendant for the price which he had paid for the horses; that Kingsley asked him if he had authority so to do, and he showed Kingsley the defendant's telegram; that Kingsley then asked him if the defendant kept at 130 London Street; that he told Kingsley that he did not know; that he went away, soon returned, and informed Kingsley that one Alexander McKinley kept a stable at 130 London Street, and that his firm had had dealings with him; that Kingsley then advised him to ship and bill the horses to McKinley, and to draw on him; that Kingsley thereupon made out a bill of the horses, which began with the words, "Alex. McKinley bought of D. McKinley & Sons," and amounted with charges and commissions to the sum of \$2080; that the plaintiffs assigned and

delivered this bill to the National Bank of Brighton; that Kingsley drew a draft on McKinley for \$2080, payable to the order of the bank; that the plaintiff Bernard then went with Kingsley and obtained a bill of lading for the horses from a steamship company, in which the plaintiffs were named as the consignors and the National Bank of Brighton as the consignee; that this bill of lading was indorsed by the bank to "Alexander McKinley, or order, 130 London Street, Glasgow, for our account," and was enclosed with the bill in the following letter, addressed to McKinley, and signed by the president of the bank: "Enclosed find a bill for ten horses bought by D. McKinney & Sons for your account, the same being assigned over to this bank. We also inclose to you bill of lading of the same shipped on steamer Lucerne for Glasgow, by D. McKinney & Sons to the order of this bank, and by the bank indorsed over to you for our account. You will please deposit the amount of the bill, \$2080, with Messrs. Blake Bros. & Co., bankers, of London, to our credit, to be cabled and paid to us here in settlement of the account. You will also have £8 per head freight to pay there. Should there be any loss, you will forward the proofs of loss to us here, and we will collect payment here for your account." The plaintiffs objected to the admission of this letter, on the ground that it was not authorized by the plaintiffs; but the judge admitted it, and the plaintiffs excepted.

McKinney testified that he left the bill of the horses and the bill of lading with Kingsley to send to McKinley; that he said he would send them; and that he took full charge of the matter; that he never notified the defendant that he had purchased the horses, or that he had shipped them to Glasgow, and that he never requested McKinley or Kingsley so to do; and that he employed one McIlvain to take charge of the horses to Glasgow.

McIlvain, who, at the plaintiffs' request, went to Glasgow with and took charge of the horses, testified, that, on the night the steamer arrived in the Clyde, he went to McKinley's house and told his servant to notify McKinley that he had some horses which had been shipped to him for the defendant; that on the following morning the defendant came to the wharf with some men; that the witness pointed out the horses to the defendant;

that the latter left him, saying he wanted to see the captain; that he soon returned and told the witness he had paid the freight on the horses; that he superintended the removal of the horses to the wharf and led some of the horses away from the wharf, while the other men, at the same time, led the others, and that he told him he would send a cab for the balance of the grain and the blankets; that one of the plaintiffs, two or three days after the arrival of the horses, came to Glasgow; and that, in a conversation between him and the defendant, the plaintiff asked the defendant if he had got his horses, and the defendant replied, "Yes."

Bernard McKinney, one of the plaintiffs, testified that the bank had received from McKinley, as the proceeds of the sale of the horses, a certain sum, leaving the balance claimed in this action.

The defendant testified that he wrote the telegram and letter to the plaintiffs on the same day in Glasgow; that he resided two or three miles out of the city, and that he added "130 London Street," in order that any reply sent by the plaintiffs might be sent there, and save the expense of forwarding it to his house; that he never received any information from any source that the horses had been forwarded or shipped on his account, or that any draft had been drawn on account of any horses purchased or shipped on his account; that he assisted in removing the horses from the ship at the request of McKinley, whose foreman was sick; that the horses were taken to McKinley's place, and that a few days after one of the plaintiffs came to Glasgow, took charge of the horses, and sold them to McKinley at an agreed price; that neither the plaintiffs nor McKinley ever offered the horses to him at Glasgow, or notified him that they had been shipped on his account; and that he was never asked to pay for them until he came to this country in the following August, or ever asked if he had received them.

The defendant offered in evidence the deposition of McKinley. The commission was directed "to any commissioner appointed by the Governor of the Commonwealth of Massachusetts, or to any justice of the peace, notary public, or other officer legally empowered to take depositions or affidavits in Glasgow, Scotland." The certificate annexed to the deposition was headed,

"State of Massachusetts, Suffolk ss.," and was signed, "D. D. Balfour, Sheriff Substitute of the County of Lanark, an officer legally empowered to take depositions." The plaintiffs objected to the competency of the deposition, on the ground that it was not duly authenticated and taken by a competent officer, and on the ground that it was not taken in Glasgow, Scotland, as the commission directed. The judge sent for the envelope in which the commission came, from which it appeared that it was addressed to "Jos. A. Willard, Esq., Clerk of Superior Court, Boston, Mass., U. S."; that it was postmarked "Glasgow, Feb. 19, 1881," and had on it an English postage-stamp. On examination of this envelope and the other papers, the judge, being satisfied that the deposition was in fact taken in Glasgow, admitted it; and the plaintiffs excepted. The plaintiffs further contended that the envelope was not evidence to which the judge had any right to refer.

McKinley testified in the deposition that he received the horses, with the invoice, the bill of lading and the letter annexed, and paid the freight thereon; that, upon being notified that the horses had arrived for him, his foreman being sick, he requested the defendant to superintend their unloading, as he was familiar with that work; that the horses were brought directly to his place from the steamship; that he did not know that they were intended for the defendant; that he never notified the defendant that the horses were for him, and never offered or tendered them to him, or requested him to take them or pay any draft on their account; that, a few days after the horses arrived, one of the plaintiffs came to Glasgow, and he asked him if the horses were intended for the defendant; that McKinney said the defendant had nothing whatever to do with them; and that the horses were under his custody and control until about the 5th or 6th of July, when he purchased them of McKinney at an agreed price, and sent the proceeds to the Brighton Bank, as directed in the letter.

The plaintiffs requested the judge to instruct the jury as follows: "1. No specific tender was necessary; if, in any form or way, the defendant had reason to know that these horses had arrived, and were for him, and that he could have had them, it was enough. 2. The transaction at the bank, as explained by

the plaintiffs, if believed by the jury, is no bar to the maintaining of this action by the plaintiffs against the defendant, and no notice from the bank to the defendant was legally essential. 3. No assent of the bank to a tender to the defendant was essential, provided the jury are satisfied the bank was willing the defendant should have and receive the horses under the order of McKinney."

The judge declined to give these instructions, and instructed the jury "that, in order to entitle the plaintiffs to recover, they must show that the horses were purchased and shipped to the defendant, or shipped in such a manner as to give him the possession or control, or the right to the possession or control, on their arrival at Glasgow, on paying the draft; that the plaintiffs, having shipped the horses in the name and under the control of the bank, were bound to show that they or their agents offered or tendered them to the defendant at Glasgow; that the bill of lading taken by the bank, and the invoice assigned and delivered to the bank by the plaintiffs, vested the property in the horses in the bank, and the indorsement of the bill of lading to McKinley gave him control of the property in Glasgow; that the jury must be satisfied that the property was afterwards tendered or offered to the defendant by McKinley, or some one authorized by the plaintiffs; that if the defendant never had any notice that the horses had been purchased or shipped for him, or on his account, and after their arrival they were not offered to him by McKinley, or the plaintiffs, or their agent, upon the payment of the costs and charges, then the plaintiffs could not recover; that a mere willingness on the part of the bank, or their agent McKinley, that the defendant should have the horses, was not sufficient to make the defendant liable; that no specific tender was necessary; that if there was an offer to deliver by McKinley on payment of the draft, it was sufficient; or if, in any way, the horses came into the possession or under the control of defendant, with the understanding that they were for him, it was sufficient."

The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

G. W. Searle & D. H. Lannan, for the plaintiffs.

N. Morse & H. G. Allen, for the defendant.

FIELD, J. The plaintiffs declare in tort as well as in contract, but the exceptions relate only to the two counts in contract. Under these counts, the plaintiffs must show a delivery of, or an offer to deliver, the horses to the defendant on payment of the sum of money agreed to be paid. The horses were not sent to the defendant, but to one McKinley. The plaintiffs must therefore show either that McKinley was the agent of the defendant to receive for him the horses, or that some delivery or offer to deliver was made to the defendant by McKinley or some one else in behalf of the plaintiffs.

The instructions given were correct, applicable to the case and sufficient, and the instructions asked for, so far as they differed from those given, were rightly refused.

The letter sent McKinley by the president of the bank, enclosing the bill of lading of the horses, was properly admitted. It was a part of the transaction, and tended to show under what claim or by what right McKinley received the horses, and whether he had any knowledge that they had been sent him for the defendant; and there was evidence that sending such a letter was within the authority given by the plaintiffs to the president of the bank.

The only remaining exceptions relate to the admission in evidence of the deposition of McKinley. The preliminary fact, that the deposition was taken in Glasgow, and not in Suffolk county in Massachusetts, was within the authority of the court to find, and was found on competent evidence. We think that this deposition was within the sixth rule of the Superior Court, which was made pursuant to the Gen. Sts. c. 131, §§ 31, 34; *

* The Gen. Sts. c. 131, § 31, provide that "the courts may from time to time make proper and convenient rules as to the time and manner of opening, filing and safe keeping of depositions, and other regulations concerning the taking and using thereof, which are not inconsistent with the provisions of law."

Section 34 provides that "the deposition of a witness without this State may be taken under a commission issued to one or more competent persons in any other State or country, by the court in which the cause is pending; or it may be taken before a commissioner appointed by the Governor for that purpose in any part of the United States or in any foreign country; and in either case the deposition may be used in the same manner and

and that the burden of proving that the officer was not legally empowered to take depositions was on the party objecting; and that the deposition was rightly admitted. See *Adams v. Graves*, 18 Pick. 355.

Exceptions overruled.

HEPSEBETH FENTON vs. GEORGE W. TORREY.

Suffolk. March 16. — June 28, 1882. ENDICOTT & DEVENS, JJ., absent.

A mortgagor, who has conveyed his equity of redemption, but remains personally liable upon the mortgage note, and who has been compelled to pay the balance due thereon, after the proceeds of a sale by the mortgagee under the power of sale contained in the mortgage have been applied upon the note, may maintain an action against the mortgagee for misconduct in conducting the sale, by reason of which a smaller sum was obtained than otherwise would have been.

C. ALLEN, J. The first two counts in the declaration, and the plaintiff's offer of proof, show substantially the following case: The plaintiff executed a mortgage of real estate to the defendant, to secure a note for \$16,400, and afterwards sold the equity of redemption to persons who agreed to assume and pay the note. The defendant assigned the mortgage and indorsed and guaranteed the note to Norcross and others; and thereafter, acting in their names, by virtue of a power of sale contained in the mortgage, made a sale of the mortgaged premises for the sum of \$10,000, which was applied in part payment of the note.

subject to the same conditions and objections as if it had been taken in this State."

The sixth rule of the Superior Court provides that the commission to take the deposition of a witness without the State "shall be directed to any commissioner appointed by the Governor of this State to take depositions in any other of the United States, or to any justice of the peace, notary public, or other officer, legally empowered to take depositions or affidavits in the State or country where the deposition is to be taken, unless the parties shall agree upon the commissioners;" and that "when a deposition shall be taken and certified by any person, as a justice of the peace, or other officer as aforesaid, by force of such commission, if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting."

The defendant thereupon paid the balance due upon the note and took up the same, and brought an action upon it against the plaintiff, recovered judgment, and satisfied the judgment by a sale of property of the plaintiff. Both counts aver misconduct in conducting the sale, in not properly advertising the same, in not allowing to persons present at the sale a fair opportunity to bid, and in other particulars.

It has often been held that one who undertakes to execute a power of sale is bound to the observance of good faith, and to a careful regard for the interest of his principal. *Thompson v. Heywood*, 129 Mass. 401, and cases there cited. The question usually arises on a bill in equity brought to restrain or to set aside a sale; but a remedy at law is also open to a party injured by a failure to perform this duty. It was however contended on behalf of the defendant that the plaintiff, after selling her equity of redemption, could not maintain such an action; and the presiding judge so ruled. But, inasmuch as the plaintiff still remained personally liable upon her note, she had a direct interest that the price realized upon the sale should be as high as possible, and that the power of sale should be faithfully executed; and, upon the offer of proof, it must now be assumed that she suffered actual loss in consequence of the defendant's misconduct, by being obliged to pay the balance due upon her note. The circumstance that her grantees might also be injured, is no reason why she should not be allowed to recover the loss sustained by herself.

Exceptions sustained.

S. J. Thomas & C. P. Sampson, for the plaintiff.

N. Morse, for the defendant.

FRANCIS M. HOLMES & others *vs.* SARAH W. WINCHESTER.

Suffolk. March 24. — June 28, 1882. ENDICOTT & FIELD, JJ., absent.

A wife's release of dower in her husband's land, at his request and for his benefit, in consideration of an agreement by him to make a transfer to her of shares of stock in a corporation, which are no more than a fair equivalent for the value of the dower, he being solvent at the time of making such agreement, vests in her such an equitable title to the shares agreed to be transferred, that his assignees in insolvency cannot, on a bill in equity, avoid a subsequent transfer of the shares to her, made by him when insolvent, under such circumstances that it would be in fraud of the Gen. Sts. c. 118, § 91, if the property then belonged to him.

BILL IN EQUITY, filed January 8, 1881, by the assignees in insolvency of George C. Winchester, to compel the transfer of 250 shares of the stock of the Ashburnham Railroad Company, conveyed by Winchester to the defendant, his wife. Hearing before *Field, J.*, who found the following facts:

On July 1, 1878, George C. Winchester executed and delivered to certain persons, as trustees, a mortgage upon land in Ashburnham, in which mortgage the defendant joined, releasing dower.

At the time of this conveyance, George C. Winchester was the owner of all the stock of the Ashburnham Railroad Company, which consisted of 300 shares; and, in consideration of the release of dower by the defendant, he orally promised and agreed to give her said 300 shares of stock, and also to pay her the sum of \$10,000 in cash as compensation therefor, which was only a reasonable compensation for her release of dower.

In June 1879, George C. Winchester was insolvent, and knew that he was insolvent. Proceedings in insolvency were instituted against him in September 1879, and the plaintiffs were duly appointed his assignees. With a view of performing his said promise and agreement with the defendant, which he had neglected to this time to perform, he, in June 1879, and when he knew he was insolvent, and with a view of preventing said stock and the property therein from coming to his assignees in insolvency, caused 250 shares of said stock to be transferred to the defendant. At the time of this transfer, the defendant had reasonable cause to believe that her husband was insolvent, and

that he made the transfer with the view of preventing said property from coming to his assignees in insolvency; and such transfer was in fraud of the laws relating to insolvency.

Upon these facts, the judge ruled that the defendant had no right to retain the stock as against the plaintiffs; entered a decree, ordering her to transfer the same to them; and, at her request, reported the case for the determination of the full court.

G. F. Verry & F. A. Gaskill, for the defendant.

S. Hoar, for the plaintiffs.

C. ALLEN, J. A wife's release of dower in her husband's lands, given at his request and for his benefit, is a valuable consideration for a conveyance by him to her of property which is no more than a fair equivalent. *Bullard v. Briggs*, 7 Pick. 533. *Sykes v. Chadwick*, 18 Wall. 141. *Garlick v. Strong*, 3 Paige, 440. It is in this respect like a conveyance of her separate property for his benefit and at his request. In consideration of such a release, the husband in this case agreed to give her the specific shares in question, and more, and also a sum of money. It must be presumed, if the fact is important, that he was solvent at the time; and that, in releasing her dower and accepting his promise for specific reimbursement, she acted in good faith.

In equity, for many purposes, a husband and wife are regarded as distinct persons, and capable of contracting with each other; and it violates no principle of equity to hold the husband's contract in this case valid and enforceable by her. 2 Kent Com. 164, 166, 174. Story Eq. Jur. §§ 1372, 1373, 1377 a. *Wallingsford v. Allen*, 10 Pet. 583, 594. *Arundell v. Phipps*, 10 Ves. 139. The circumstance that no trustee was appointed does not destroy the contract. A husband may be a trustee for his wife, either under an express, or implied, or resulting trust. *Turner v. Nye*, 7 Allen, 176, 181. *Hayward v. Cain*, 110 Mass. 273. *Walker v. Walker*, 9 Wall. 743. The agreement was to convey to her all the shares of the corporation. A bill in equity will lie to enforce specific performance of such an agreement. *Todd v. Taft*, 7 Allen, 371. *Duncuft v. Albrecht*, 12 Sim. 189. *Cheale v. Kenward*, 3 DeG. & J. 27. From the time of making the agreement to give these shares to his wife, the husband held them as

trustee for her; and she was from that time forward the equitable owner of them. Story Eq. Jur. §§ 789-792. To protect and enforce this interest as equitable owner, she would at any time have been entitled to the aid of a court of equity. *Atlantic National Bank v. Tavenor*, 130 Mass. 407, and cases there cited. There was therefore no interest in these shares to which the assignees in insolvency of the husband were entitled. They were not the property of the husband. He held them merely as trustee, with no beneficial interest in them. Assignees in insolvency take their title subject to all equities, unless it is specially provided otherwise by statute. Story Eq. Jur. §§ 1038, 1228, 1229, 1411. *In re McKay*, 1 Lowell, 345. *In re Griffiths*, 1 Lowell, 431. *Hauselt v. Harrison*, 105 U. S. 401. Even the fact that property is so situated that a creditor might seize it on an execution against the debtor, is not decisive in favor of the right of the assignee to take and hold it. *Audenried v. Betteley*, 5 Allen, 382. The conveyance by the husband to his wife in this case deprived the assignees of nothing to which they were entitled. *Nickerson v. Baker*, 5 Allen, 142. If this property had come to their possession, they would have been bound to transfer it to the defendant. Story Eq. Jur. § 1411. The fact, therefore, that she had reason to believe that her husband was insolvent, and that the transfer was made with the view of preventing the property from going to the assignees, and under such circumstances that, if the property belonged to him, it would be in fraud of the Gen. Sts. c. 118, § 91, will not prevent her from receiving and holding the property which in equity belonged to her.

Bill dismissed.

DWIGHT FOSTER & others, trustees, *vs.* CITY OF BOSTON.

Suffolk. Nov. 18, 1880; May 5. — June 29, 1882. C. ALLEN, J., absent.

A corporation, having large tracts of unimproved lands, for the purpose of borrowing money to discharge existing liens upon the lands and to make them available for sale, issued bonds, the interest on which was payable semiannually, and, as security for the payment of principal and interest, conveyed its lands to trustees on the following trusts: 1. To permit the corporation to remain in possession, improve and sell the lands, until default should be made in the payment of the bonds, or the interest thereon. 2. To release from time to time from the lien created by the conveyance such portions as, in the opinion of the trustees and of the president of the corporation, might be safely released without impairing the security for the payment of the bonds. 3. To receive and invest the moneys received from the proceeds of sales of said lands, and to pay therefrom interest due on the bonds and the expenses of the trust, and to apply the residue to the purchase and cancellation of the bonds. The deed further provided, that, in case default should be made in the payment of the bonds or of the interest thereof, and for six months thereafter, all the bonds should become payable; that the trustees then might, and, upon the request of a certain number of the holders of the bonds, should, enter and take possession of the granted premises, and should thereafter, as attorneys of the corporation, so long as the default should continue, so manage and dispose of the same as to carry out the purposes of the trust, by sales of the lands from time to time. The corporation covenanted that, in case of default continuing for six months, it would on the request of the trustees deliver up possession of the granted premises, and make any further conveyance required. *Held*, that until entry by the trustees on default in the payment of the principal or interest of the bonds, they had no power to make a contract to sell any portion of the lands.

W. ALLEN, J. This is a bill in equity in which the plaintiffs allege that, as trustees under a deed from the Boston Water Power Company, they made a contract to sell a parcel of the land conveyed to them by the deed; that the contract purchaser refuses to accept a deed, on the ground that the plaintiffs cannot give a clear title by reason of a right in the land given by the corporation, the Boston Water Power Company, to the defendant, prior to the deed to the plaintiffs. The plaintiffs further allege that they took their deed without notice of the defendant's right, and are not bound by it, on the ground that the deed to the defendant, although recorded in the registry of deeds, was not acknowledged; and they ask for a decree that the defendant release it.

If the contract was entered into by the plaintiffs as trustees, by virtue of the authority given to them by the deed of trust,

they may be entitled to the relief sought; but if they have not authority to make the contract or to convey the land, or if the contract was made in behalf of the corporation, and the sale would be under its authority and for its benefit, they show no title to such relief.

The deed is in the form of an indenture between the Boston Water Power Company, a corporation, of the first part, and a party of the second part as trustees, whose successors in the trust the plaintiffs are. It recites that the party of the first part, being possessed of large tracts of land in the Back Bay, so called, in Boston, and being in need of money for the purpose of improving the lands and making them available for sale, and for paying its indebtedness and discharging liens existing upon the lands, proposes to borrow money upon the security of the lands, and for that purpose to issue bonds to the amount of \$2,800,000, to be authenticated by a certificate signed by the party of the second part as being secured by the indenture. It next recites the disposition to be made of the bonds; the larger part of which are to be delivered by the corporation to the trustees, to apply, so far as needed, upon certain specified liabilities, and all not used for that purpose to be returned to the corporation; the remainder of the bonds to be applied to the payment of other debts of the corporation, and the discharge of liens on its property, and then to improving, managing and disposing of the lands, to the expenses of the trust, and the general wants of the corporation. After the recitals, the indenture, "to the end that the punctual payment of the bonds so issued, and of the interest thereon, as and when the same shall become due, may be secured, and in consideration of one dollar paid by the party of the second part," conveys the land to them in fee simple, to hold "in trust for the intents and purposes and upon the trusts following." The trusts declared, until default in the payment of the bonds, in effect give to the corporation the same possession and control of the land, and the right to improve and develop and to sell and convey it, and to dispose of the avails of it, as if the indenture had not been made, except as limited by the provision that the trustees shall release from time to time from the lien created by the indenture such portions of the land as, in their opinion and that of the president of the corporation, may

be released without impairing the security, or if those parties do not agree as to what lands shall be released, that question may be determined by the treasurer of the Commonwealth, whose decision shall be final, and shall direct the action of the trustees. There is a further provision, that the trustees shall receive and invest all moneys that shall be paid to them by the corporation from the proceeds of the sales of the land, and apply the same to the payment of the interest on the bonds, and the expenses of the trust, and to the purchase and cancellation of the bonds.*

* The indenture sets forth the trusts as follows:

"1st. To permit said party of the first part to remain in the possession and enjoyment of the granted premises, and to improve the same by filling said land and flats, and by laying out streets and avenues thereon, and otherwise making the same available for sale, and to sell and convey the same and to dispose of the current net revenues and avails thereof in such manner as it shall elect, until and unless default shall be made in the payment of said bonds, or the interest thereon, or any part thereof.

"2d. To release from time to time from the lien created by this instrument, so that the same may be sold and conveyed free from incumbrance, such portions of said lands as in the unanimous opinion of said trustees, and of the president of said Boston Water Power Company for the time being, may be safely released without impairing the security for the payment of said bonds, either by reason of the receipt of the proceeds of sales by said trustees, or by reason of the increased value of the lands of said corporation by reason of the advance in value, or by reason of the increased value given to the remaining lands by the improvements made thereon by said corporation. And the deed of the said corporation, and the release of the said trustees, both duly executed, shall be conclusive evidence of the unanimous opinion of said trustees and of said president. And in case said trustees and said president shall not agree, then, upon the application of either, the question of the lands so to be released shall be submitted to and determined by the treasurer of the Commonwealth of Massachusetts for the time being, whose written decision shall be final, and shall direct the action of the trustees thereon.

"3d. To receive and invest all sums of money that may be paid them by said party of the first part from the proceeds of sales of said land, and to pay therefrom from time to time all interest due or that may become due on said bonds, and the expenses of the trust created by this instrument, including the reasonable compensation of the trustees; and to apply the residue to the purchase and cancellation of the bonds secured by this instrument; said purchase to be made at the market value of said bonds, but in no case at a price exceeding the par value thereof and accrued interest.

"4th. In case default shall be made in the payment of the bonds issued under this instrument, or any of them, or of any of the interest coupons

From this summary, and more clearly from the full provisions of the indenture, it appears that all the powers and duties of the trustees, not derived from provisions relating to a default in the payment of the bonds, are, after accepting the deed and making their certificate upon the bonds: 1st, to receive the bonds

attached thereto, at any time when and where the same may become due and payable according to the tenor and effect thereof, and for six months thereafter, then and in that case all of said bonds shall thereupon immediately become due and payable, and the said trustees, and the survivor or survivors of them, and their successors or successor in said trust, and the survivor or survivors of them, may, and upon the written request of the holders of at least one third part of the bonds then outstanding and unpaid, shall, enter upon and take possession of all and singular the granted premises, or so much thereof as shall then remain unsold, and all rights of the party of the first part therein, and all obligations and securities which may have been received for any lands conveyed by this instrument that may have been sold, and as the attorneys in fact or agents of the party of the first part, shall thereafter, and so long as said default shall continue, so manage and dispose of the same as shall best enable them to carry out and fulfil the purposes of their trust, either by sale or sales thereof in its then existing condition, or by completing the filling said lands and flats, or of such portions thereof as they shall deem expedient, and otherwise improving the same, and thereafter selling the same by public or private sale, upon such notice, in such parcels, at such prices, and upon such terms of payment and security, at such time or times, and in such manner, as they shall deem just and reasonable, and for the best interests of all parties concerned in the trust hereby created, with full power to give good and sufficient deeds of conveyance in fee simple for any lands so sold; and after paying all expenses connected with and incident to the management and care of said property, including the compensation of the trustees, and the cost of any improvements that may have been made thereon by them or their agents, shall apply any remaining surplus of the proceeds of any sale or sales made by them, and all other moneys that may have come into their hands as such trustees, or so much thereof as may be needed, to the payment *pro rata* of the principal and interest of all of said bonds then remaining unpaid, and shall restore the residue thereof, and all lands, securities and other property remaining in their possession after such payment is completed, to the party of the first part; and thereupon this trust shall terminate. And it is further declared that no purchaser under any or either of the foregoing trusts shall be under any obligation to inquire into the necessity or regularity of any sale thereunder, nor see to the application of any of the purchase moneys thereof, but that the receipt of the trustees or trustee for the time being to such purchaser or purchasers for such purchase moneys shall be his or their full and effectual acquittance and discharge therefor."

delivered to them under the agreement, and apply them in the manner prescribed; 2d, to receive the moneys, the proceeds of lands sold by the corporation, which should be paid to them by it, and apply them as prescribed; 3d, in regard to the land, in trust for the bondholders, to preserve the lien upon the land, except such as should be released by the trustees; and in trust for the corporation to permit it to have the possession, management and control of the land, and the power to sell and convey the same, but not free from the lien, without the approval of the trustees or of the treasurer of the Commonwealth, and to dispose of the proceeds of sales; and upon the further trust for the corporation that they shall release the lien upon lands sold by the corporation when in their opinion, or in that of the treasurer of the Commonwealth, such release will not impair the security.

The plain intention and effect of the instrument is, that, until the provisions relating to a default in the payment of the bonds shall take effect, the corporation shall retain the full management and control of the lands, and the exclusive power to negotiate and make sales and conveyances, with the qualification that it cannot convey any land discharged of the lien without the release of the trustees. The trust for the bondholders therefore is, to hold the legal title so as to preserve the lien until the bonds are paid according to their tenor, except as to such portions as in their opinion, or according to the written opinion of the treasurer of the Commonwealth, can be safely released without impairing the security, and the whole power and interest and duty of the trustees in respect to the land is so to hold the legal title; beyond that they have no right in the management, improvement or disposition of the land, nor in the proceeds of the sales of it except such as the corporation may voluntarily pay to them. It is obvious that, except under the powers and interest given to them after default in the payment of the bonds, they have no title to the relief sought.

After default has continued for six months, the trustees are authorized to take possession of the land, and certain provisions of the indenture are to become operative, among which is a power of sale. Under the provision in a mortgage that in default of payment the mortgagee may enter and take possession of the premises and sell and dispose of them, it has

been held that the entry and possession are conditions precedent without which the power of sale cannot be exercised. *Roarty v. Mitchell*, 7 Gray, 248. It has also been held, that when the entry authorized by the power is for the purpose of the sale only, and to enable the sale to be made on the premises as required by the terms of the power, it is not necessary that it should be formally made at any other time or manner than at the time, and for the purposes, of the sale. *Cranston v. Crane*, 97 Mass. 459. In the power under consideration, we think the entry is not authorized for the purpose of the sale only, but also for other purposes with which the power of sale is so connected, and upon which it is so dependent, that it cannot be exercised except in connection with other powers and duties, and after the assumption of them by the trustees by entry and possession taken. The premises consisted of land and flats held by the corporation for the purpose of selling, after improving them by filling, laying out streets, &c. The sales were intended to be made in small parcels, from time to time, as the lands should be improved and prepared for sale. It was not intended that, upon default in payment, the whole of the land should be sold at once, but that it should be managed and developed and disposed of in the same manner as before. The indenture plainly intends that the duty of managing the property and preparing it for sale, and of selling it, should be in one and the same party, and that the power of managing and fitting for sale, and the power of sale, should not be in different parties. Until default in payment, these powers are in the corporation; after default, they continue in the corporation until they are assumed by the trustees. The bonds were not due for ten years. The interest was payable semiannually, and the indenture provides that, on any failure to pay interest, continued for six months, the whole of the bonds shall become due and payable. It was not the intention of the parties that the whole property should be sold at once upon a default continued for six months, nor that a default should of itself determine the authority of the corporation to manage and dispose of the property; while it was intended that the trustees should, after a default continued for six months, have power to take the whole administration of the property into their own hands. Until this is done, the limited power of sale given to

the corporation remains as if there had been no default; it is a part of the general power of managing and disposing of the lands, and does not pass to the trustees by the default, but by their act in taking the possession and management into their own hands. The true construction of the instrument implies, in the first declaration of trust for the corporation, the addition of such words as "and until possession therefor shall be taken by the trustees, as hereinafter provided." By the terms of the power to the trustees, when a default has continued for six months, the trustees may enter upon and take possession of the premises. That this was not only not imperative upon the trustees, but that it gave them an option which it was contemplated that they might exercise, appears from the provision requiring them to take possession at the written request of the holders of one third of the bonds. Having taken possession, in the exercise either of their discretion, or of that of the bondholders, the direction is imperative that they, "as the attorneys in fact or agents of the party of the first part, shall, thereafter, and so long as said default shall continue, so manage and dispose of the same as shall best enable them to carry out and fulfil the purposes of their trust, either by sale or sales thereof in its then existing condition, or by completing the filling said lands and flats, or of such portions of them as they shall deem expedient, and otherwise improving the same, and thereafter selling the same by public or private sale, upon such notice, in such parcels, at such prices, and upon such terms of payment and security, at such time or times, and in such manner, as they shall deem just and reasonable, and for the best interest of all parties concerned in the trust hereby created, with full power to give full and sufficient deeds of conveyance in fee simple for any lands so sold."

It is also provided that, when the trustees take possession of the premises, they shall also take possession of all obligations and securities which may have been received for lands sold. The corporation covenants that, in case of default continued for six months, it will upon the written request of the trustees deliver up possession of the premises and all securities held by it for land sold, and that it will, upon written request, execute and deliver any further necessary conveyance.

By the true construction of the indenture, the trustees, after default continued for six months, can exercise their discretion whether to take possession or to leave the corporation in possession. Until they take possession, the rights of the corporation as to the management and disposal of the property remain as before. Upon entry and possession taken by the trustees, the right of the corporation to the management and disposal of the lands ceases, and the trustees become vested with their full powers for the execution of their trust, to improve and sell the lands as they shall think most for the advantage of all parties interested. One of these powers is the power of sale, and we think it arises only upon possession taken, and that upon a mere default, and without entry, and while the corporation remains in the possession and management of the premises, there is no power in the trustees to sell and convey, from time to time, parcels of the land. By the words of the indenture, entry and possession taken is a condition precedent to the exercise of the power of sale, and, by the meaning of it, that power is to be exercised only in connection with larger powers and duties, which cannot be assumed without taking possession of the premises.

The amended bill alleges that prior to January 22, 1880, default was made in the payment of interest on the bonds. The contract in respect of which relief is sought is dated June 3, 1880. It does not appear that the contract was made more than six months after the default, and it appears that no entry for default has been made, but the corporation continues in the lawful exercise of the powers granted to it in the declaration of trust. The sale, therefore, cannot be made by virtue of the power in the trust declared for the bondholders; and the agreement and sale can have effect only under the authority and for the benefit of the Boston Water Power Company.

As, for these reasons, the plaintiffs fail to show title to the relief sought, it is unnecessary to consider the other questions argued at the bar.

Bill dismissed.

The case was argued at the bar in November 1880, by *H. D. Hyde*, (*S. Bartlett* with him,) for the plaintiffs, and submitted on a brief by *J. P. Healy*, for the defendant; and in May 1882, was further submitted on briefs by *Bartlett & D. Foster*, (*Hyde* with them,) for the plaintiffs, and on the former brief, for the defendant.

WILLIAM MAHONEY vs. JOHN FITZPATRICK & another.

Suffolk. Nov. 14, 1881. — June 29, 1882. MORTON, C. J., FIELD & C. ALLEN, JJ., absent.

A promissory note, payable "on demand or in three years from this date," with interest at a certain rate "during said term or for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable.

CONTRACT upon a promissory note for \$300, dated August 12, 1878, signed by the defendants, payable to the order of Sallie McCushing, "on demand or in three years from this date," with interest at six per cent "during said term or for such further time as said principal sum or any part thereof shall remain unpaid;" and by McCushing indorsed to the plaintiff. Writ dated August 3, 1880. Trial in the Superior Court, before *Pitman*, J., who ruled that the action could not be maintained; ordered judgment for the defendants; and reported the case for the determination of this court. If the ruling was erroneous, the judgment was to be set aside and the case to stand for trial; otherwise, the judgment to be affirmed.

P. J. Flatley & T. Flatley, for the plaintiff.

M. Holbrook, for the defendants.

W. ALLEN, J. The question is whether the instrument declared on is a negotiable promissory note, on which an action will lie by the indorsee against the maker before the expiration of three years from its date. The plaintiff does not rely upon it as a note payable on demand, but contends that it is a promise to pay in three years at all events, and sooner if demand is made by the holder. Assuming this to be the true construction, the question is presented, whether a note payable at a time named therein, or earlier at the option of the holder, shown by a demand made, is negotiable. The objection is, that there is no certain time of payment fixed by the note. To be negotiable, a note must be payable at a time certain. The time of payment may be fixed by being named in the note, or made to depend upon some event which must certainly happen. Thus a note payable at a certain period after the death of the maker is negotiable, because the time of payment depends upon an event

which must certainly happen. So a note payable on, or a certain period after, presentment or actual demand made, is negotiable, because the presentment or demand, being an act of the holder contemplated in the making of the note, and necessary to give it effect, is deemed a certain event. *Clayton v. Gosling*, 5 B. & C. 360.

In the instrument under consideration, a time and an event are named, either of which without the other would make certain the time of payment; so, if both were used in connection to fix one time, as three years after demand, the note would be payable at a time certain. But they are used to designate two separate times, at either of which the note may, and at either of which it may not, become payable. It is not negotiable as payable at the time named, because, whether it will become payable at the expiration of three years is made to depend upon the uncertain event of a previous demand, and, while the time is certain to come, it is uncertain whether the note will then become payable. It is not negotiable as payable upon the happening of a certain event within the three years, because it is not certain that a demand will be made, — no demand being necessary to hold the maker, and the instrument itself assuming that such demand may not be made. It is not a note payable at a named time, because it may become payable before that time; it is not a note payable upon a certain event, because the event named may never happen. Whether it will become payable by lapse of time or by a demand is uncertain and contingent, depending upon the option of the holder. A note payable at a future day certain, or earlier at the option of the maker or of a stranger, is not payable at a time certain, and is not negotiable. *Way v. Smith*, 111 Mass. 523. *Stults v. Silva*, 119 Mass. 137. The case at bar comes within the principle of these decisions. A negotiable note includes not only the contract between the maker and holder, but also the contracts between the indorsee and indorser and maker. The objections to the negotiability of a note payable at a fixed time or earlier at the option of the holder, are as great as to a note payable at such time or earlier at the option of the maker. In the latter case, the note may be paid before the time named; in the former, it may become payable before that time. In the one case, the time when the note

may become payable is fixed, and it cannot become payable at any other time. The time of payment, as affects rights under the statute of limitations, rights of set-off, of equitable defences, of notice to indorsers, and all rights so long as any liability exists on the note, is fixed and certain. When the note is paid, the occasion of such rights ceases, and they become unnecessary. In the other case, the note may become payable before the expiration of the period named, and the rights of all parties, so far as they are affected by the time of payment, are contingent upon the exercise of his option by the holder of the note. The cases bearing upon the question are numerous and conflicting. We notice only those cited from our own reports. In *Stevens v. Blunt*, 7 Mass. 240, cited by the plaintiff, the court held that a note payable "by the twentieth of May, or when he" (the payee) "completes the building according to contract," was negotiable. No reasons are given; but in *Story on Prom. Notes*, § 28, the author, who was of counsel for the plaintiff, says of the case, that "the court held the instrument to be a valid promissory note, it being payable absolutely at a day certain (meaning the 20th of May)." In *Jillson v. Hill*, 4 Gray, 316, the action was between the original parties to the note, and the question of its negotiability did not arise. In *Cota v. Buck*, 7 Met. 588, the precise question presented in the case at bar does not seem to have been raised or considered by the court.

In the opinion of a majority of the court, the instrument declared on is not a negotiable promissory note, upon which an action will lie against the maker by an indorsee, upon a demand made by him within the three years.

Judgment affirmed.

JOHN M. FORBES & others *vs.* BOSTON AND LOWELL
RAILROAD COMPANY.
SAME *vs.* FITCHBURG RAILROAD COMPANY.

Suffolk. March 15, 16. — June 29, 1882. ENDICOTT & DEVENS, JJ., absent.

The transfer and delivery of an inland bill of lading of goods, by the consignee to a person who advances money upon them, is not in form or effect a mortgage, but vests in such person a property in the goods, which entitles him to maintain an action against one who wrongfully converts them.

A delivery of an inland bill of lading for a valuable consideration is in law the delivery of the property itself; and it is not necessary for the person to whom it is delivered to take possession of the property upon its arrival, or to give notice to the carrier or warehouseman who has the actual possession of the property.

The delivery of goods by a common carrier to a person unauthorized to receive them, without requiring the production of the bill of lading, but relying upon his representation that he is the holder of it, is a conversion, for which an action will lie against the carrier by the person entitled to the possession of the goods, without regard to the question of the carrier's due care or negligence.

If a usage exists for railroad corporations in a certain city to deliver to a consignee goods consigned to him by a bill of lading, not containing the words "or order," without requiring the production of the bill of lading, such a delivery is good as against a person to whom the consignee has previously delivered the bill of lading as security for an advance made by him to the consignee.

In an action against a common carrier for the conversion of goods delivered to a person unauthorized to receive them, who pays the freight upon them, the measure of damages is the market value of the goods, less the freight, with interest from the date of the conversion.

By the usual course of business in forwarding grain from C. to B., it is sent by water from C. to an intermediate point, and is thence taken by railroad to B. A bill of lading is given at C., making the grain deliverable to the shipper at the intermediate point, and there a railroad receipt is given, with a memorandum upon it showing that the grain was received from a vessel and that a bill of lading is outstanding. The bill of lading is regarded as transferring the property, and is alone used in procuring the goods from the carrier at B. *Held*, that the bill of lading is the representative of the grain during the whole of the transit from C. to B.

The owners of grain stored, according to the usual course of business, in an elevator of the railroad corporation transporting it, are tenants in common in proportion to their respective interests; and a delivery by the corporation of the quantity of grain belonging to one of such owners to a person unauthorized to receive it, is a conversion, for which an action of tort in the nature of trover will lie by the owner against the corporation.

MORTON, C. J. The first case is an action of tort, containing a count for the conversion of a quantity of corn and a count for

the conversion of a quantity of wheat. As different considerations apply to the two counts, they must be treated separately.

On or about October 20, 1879, Gallup, Clark and Company, grain-dealers in Chicago, in response to an order from Foster and Company, forwarded to Boston fifty carloads of corn, by the National Despatch Fast Freight Line, which is an association of several railroad companies, whose roads make a continuous line from Chicago to Boston, the defendant's road being a part of the line. Upon the shipping of the corn, an inland bill of lading was issued, by which it was consigned to the order of Gallup, Clark and Company, at Boston. Gallup, Clark and Company drew a draft upon Foster and Company for the price of the corn, attached to it the bill of lading, and forwarded both to the Tremont National Bank of Boston. On October 24, 1879, Foster and Company paid to the bank the amount of the draft, and the draft and bill of lading were delivered to them. Immediately upon obtaining the draft and bill of lading, Foster and Company indorsed them to the plaintiffs, as security for an advance then made by the plaintiffs to the full amount of the draft, and they have held them ever since. The corn mentioned in the bill of lading was received and transported by the defendant, arriving in Boston on October 30, 1879. It remained in its cars until December 12, 1879, when by the orders of Foster and Company it was shipped on board a vessel for Cork, and exported to Ireland. Foster and Company did not produce and present to the defendant the bill of lading, but represented that it was in their possession.

Upon these facts, it is too clear to admit of any doubt, that, by the transfer of the draft and bill of lading by Foster and Company to the plaintiffs, the title and property in the corn passed to them. The bill of lading, though not strictly a negotiable instrument like a bill of exchange, was the representative of the property itself; it was the means by which the property was put under the power and control of the plaintiffs, and the delivery of it was for most purposes equivalent to an actual delivery of the property itself.

The transaction between Foster and Company and the plaintiffs was not in form or in effect a mortgage, so that, as contended by the defendant, it must be recorded in order to have

validity; it was a transfer and delivery of the property. The clear intent of the parties was that the property in the corn should pass to the plaintiffs as security for the advance made by them. Whether they took an absolute title with a liability to account for the proceeds, or a title as pledgees, is not material, as all the authorities show that they took either a general or a special property in the corn, which entitles them to recover of any one who wrongfully converts it. *De Wolf v. Gardner*, 12 Cush. 19. *Cairo National Bank v. Crocker*, 111 Mass. 163. *Green Bay National Bank v. Dearborn*, 115 Mass. 219. *Chicago National Bank v. Bayley*, 115 Mass. 228. *Hathaway v. Haynes*, 124 Mass. 311. *Gibson v. Stevens*, 8 How. 384. *Dows v. National Exchange Bank*, 91 U. S. 618. Numerous other cases might be cited. The delivery of the bill of lading was in law the delivery of the property itself, and it was not necessary that the plaintiffs should take immediate possession of it upon its arrival, or that they should give notice to the carrier or warehouseman who held the property. *Farmers & Mechanics' National Bank v. Logan*, 74 N. Y. 568. *The Thames*, 14 Wall. 98. *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661, and L. R. 4 H. L. 317. It is true that the plaintiffs might by their subsequent laches defeat their right to assert their title. If they permitted the property to remain under the control of their assignors, and held them out to the world as having the right to deal with the property, they might be estopped from setting up their title. But the authorities are decisive to the point that, by the transfer from Foster and Company, they took a title as purchasers of the corn which entitles them to maintain this action, unless they have lost the right by their laches, upon proving a conversion by the defendant.

The next question is whether there was a conversion by the defendant. It is settled that any mis-delivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion, which renders the bailee liable in an action of tort in the nature of trover, without regard to the question of his due care or negligence. *Hall v. Boston & Worcester Railroad*, 14 Allen, 439. By the bill of lading, and by the way-bill which was sent to the defendant in

the place of a duplicate bill of lading, the corn was to be delivered to the order of Gallup, Clark and Company. The defendant contracted to deliver it to such person as Gallup, Clark and Company should order, and could not without violating its contract deliver it to any other person. By delivering it to Foster and Company, therefore, the defendant became liable for a conversion, unless it shows some valid excuse. *Newcomb v. Boston & Lowell Railroad*, 115 Mass. 230. *Alderman v. Eastern Railroad*, 115 Mass. 233. The record before us does not show any laches or any act of the plaintiffs which can excuse or justify this mis-delivery. They did not hold Foster and Company out to the world or to the defendant as one entitled to control the property. Indeed, it is admitted that the defendant did not know, until long after the delivery, that the plaintiffs had any connection with the property, or with Foster and Company. The plaintiffs did nothing to mislead the defendant. They had the right to rely upon the facts that they held the bill of lading, and that, according to the ordinary course of business, the goods could not be obtained except upon its production. The defendant saw fit to deliver them to Foster and Company without requiring them to produce the bill of lading, relying upon their representation that they were the holders of it. It took the risk of their truthfulness, and cannot now shift that risk upon the plaintiffs, who have done nothing to mislead or deceive the defendant. We are, for these reasons, of opinion that the defendant is liable for the value of the corn described in the first count of the declaration.

In the case of the wheat, there are some facts proved at the trial which lead us to a different result. By the bills of lading and the way-bills, the wheat was consigned to John H. Foster and Company at Boston. The fact that they did not contain the words "or order," or other equivalent words, so as to make them upon the face quasi negotiable, is not important. The bill of lading was yet the representative of the wheat, and its transfer and delivery to the plaintiffs vested in them the title to the property, as against the consignees and their creditors. But the presiding justice of the Superior Court who heard the case has found as a fact, "that it was the custom of the railroads terminating in Boston to deliver to the consignee goods 'billed

straight' as it is termed, that is, billed to a particular person, not to order, when they were satisfied of the identity of the consignee, without requiring the production of the bills of lading, and to rely upon the way-bills to determine the consignee and the form of the consignment."

Under this finding, we must assume that the custom existed, and that the plaintiffs knew or ought to have known of it. It materially affects the relations and rights of the parties. Although it does not affect the question of the title of the plaintiffs as against Foster and Company, it qualifies the duties of the defendant as to the delivery of the wheat. It justified the defendant in delivering it to Foster and Company, the consignees, at least at any time before notice that the property had been transferred. Under it, there was no laches in not calling for the bill of lading; and, in thus delivering, there was no violation of any of the terms of its contract, express or implied. Such delivery therefore was not a mis-delivery which would amount to a conversion and render the defendant liable to the plaintiffs. We are therefore of opinion that the defendant is not liable for the value of the wheat sued for.

The only remaining question is as to the amount of the damages the plaintiffs are entitled to recover for the conversion of the corn. As a general rule, the measure of the damages in trover is the market value of the goods converted, with interest from the date of the conversion. This rule is, however, subject to modification when the plaintiff has only a special interest or property in the goods, and is not answerable over to any person for the balance of the value. *Fowler v. Gilman*, 13 Met. 267. *Briggs v. Boston & Lowell Railroad*, 6 Allen, 246. *Peebles v. Boston & Albany Railroad*, 112 Mass. 498.

The object of the law is to give the plaintiff compensation or indemnity for the injury he sustains by the conversion. In the case before us, at the time of the conversion, the goods were subject to a lien for the freight. The only interest which the plaintiffs had in them was their market value less the freight. This interest was not increased by the fact that the plaintiffs and Foster and Company had agreed, as between themselves, that the latter should pay the freight. The payment by Foster and Company cannot be considered as a payment by the plaintiffs.

It was a payment by themselves, as a part of their scheme of fraud. If the plaintiffs can recover the full value of the corn, they are positive gainers by the fraud, and will receive more than the value of their interest at the time the fraud was committed. Under the circumstances of this case, we are of opinion that it is just and equitable that the reclamation by the defendant from Foster and Company of a part of the proceeds of the fraud should inure to the benefit of the defendant.

Upon the whole case, therefore, the plaintiffs are entitled to recover a sum equal to the market value of the corn described in the first count, less the freight, with interest thereon from the time of the conversion. If the parties cannot agree upon the amount, the case must be sent to an assessor to determine the damages upon this basis.

The controlling facts in the second case are nearly identical with those existing and applicable to the first count in the first case.

By the bills of lading in this case, the grain was shipped by a vessel at Chicago, deliverable to the order of Gallup, Clark and Company at Buffalo. The defendant contends that, upon the arrival of the vessel at Buffalo, the bill of lading became *functus officio*. If this were so, it would not affect the result, because the bill of lading was transferred before the vessel arrived at Buffalo. But it is clear that, upon the facts agreed, the bill of lading remained as the representative of the property, at least until the transit was completed by the arrival at Boston. By the usual course of business in forwarding grain from Chicago to Boston, where the shipment is partly by water and partly by rail, a bill of lading is issued by the vessel at Chicago; the grain is transferred from the vessel to the cars at some intermediate point, usually at Buffalo, and the railroad company issues a receipt similar in form to those issued in this case. This receipt contains a memorandum like the one in this case, "Ex Sch. Gallatin," which indicates "that the grain was received from a vessel arriving at Buffalo from Chicago, and that a bill of lading has been issued by that vessel and is outstanding. The vessel's bill of lading is regarded as transferring the property, and that alone is used in procuring the goods from the carrier." It is clear that

in such cases the parties contemplate a continuous transit from Chicago to Boston, and that the bill of lading is regarded as the representative of the grain during the whole of this transit. So far as any question in this case is concerned, the bills of lading have the same effect as if they had been bills from Chicago to Boston.

Upon the arrival of the grain in question at Boston, a part of it, according to the usual course of business, was stored by the defendant in its elevator, where it was mixed with other grain of a like quality. In such a case, the owner of the grain thus stored is entitled to draw out an equivalent quantity of grain of the same quality, but not to receive the identical grain which he put in. The defendant contends that for this reason an action of tort in the nature of trover cannot be maintained.

It is doubtful whether this ground is open to the defendant, the rule being that, by submitting a case upon an agreed statement of facts, the parties waive any objection to the form of the pleadings not expressly reserved. But if this is otherwise, the objection cannot be sustained. When the grain was put in the elevator, the plaintiffs and the other owners of grain stored therein became tenants in common, in proportion to their respective interests. *Cushing v. Breed*, 14 Allen, 376. *Keeler v. Goodwin*, 111 Mass. 490. *Dows v. National Exchange Bank*, 91 U. S. 618. And a tenant in common of personal property may maintain trover against a stranger who converts the property, or his interest in it. *Bryant v. Clifford*, 13 Met. 138. *Goell v. Morse*, 126 Mass. 480.

At the time of the delivery to Foster and Company, the plaintiffs were the owners of the grain entitled to the immediate possession. Such delivery was a separation of their grain from the bulk of the grain, and a misappropriation of it, and was a conversion for which the appropriate remedy is an action of tort in the nature of trover.

We are unable to see that this case can be distinguished in principle from the case of *Forbes v. Boston & Lowell Railroad*, and the result is, that the plaintiffs are entitled to recover the market value of the grain less the freight, storage and other expenses, with interest from the date of the conversion. If the parties cannot agree upon the amount, the case must be sent to

an assessor to determine the amount of the damages upon this basis.

Judgments accordingly.

W. G. Russell & J. B. Warner, for the plaintiffs.

J. G. Abbott & S. A. B. Abbott, for the defendant in the first case.

E. D. Sohier & C. A. Welch, for the defendant in the second case.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *vs.* COMMONWEALTH.

NEW YORK LIFE INSURANCE COMPANY *vs.* DANIEL A. GLEASON & another.

Suffolk. March 21, 22. — June 29, 1882. ENDICOTT & C. ALLEN, JJ., absent.

The St. of 1880, c. 227, imposing upon every corporation and association engaged within the Commonwealth in the business of life insurance an annual excise tax, "to be determined by assessment of the same upon a valuation equal to the aggregate net value of all policies in force on the thirty-first day of December then next preceding, issued or assumed by such corporation or association, and held by residents of the Commonwealth, at the rate of one half of one per centum per annum," is constitutional.

MORTON, C. J. The only question argued in these cases is as to the constitutionality of the St. of 1880, c. 227, which provides in the first section that "every corporation and association engaged within this Commonwealth, by its officers or by agents as defined by chapter one hundred and fourteen of the acts of the year eighteen hundred and sixty-four, in the business of life insurance, whether incorporated by authority of this Commonwealth or otherwise, shall annually pay an excise tax of an amount to be determined by assessment of the same upon a valuation equal to the aggregate net value of all policies in force on the thirty-first day of December then next preceding, issued or assumed by such corporation or association, and held by residents of the Commonwealth, at the rate of one half of one per centum per annum."

The power of the Legislature to impose taxes, duties and excises is not an unrestricted one, but is derived from and limited

by the Constitution, which provides that "full power and authority are hereby given and granted to the said General Court" "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same." Const. Mass. c. 1, art. 4.

It is clear that the tax in question cannot be justified as a tax on property under the first clause above cited. That clause provides that all taxes levied under its authority shall be "proportional and reasonable." It forbids the imposition of a tax upon one class of property at a different rate from that which is applied to other classes. The assessment which is the subject of controversy is not laid according to any rule of proportion, but is laid upon the corporations specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the actual value of the property of the corporations, or to the whole amount of property in the Commonwealth liable to be assessed for the public service. *Oliver v. Washington Mills*, 11 Allen, 268. *Commonwealth v. Hamilton Manuf. Co.* 12 Allen, 298. *Cheshire v. County Commissioners*, 118 Mass. 386.

It is equally clear that the Legislature in laying this assessment did not intend to exercise the power conferred by this clause of imposing "proportional and reasonable" taxes upon property. The statute expressly declares it to be "an excise tax;" it is not based upon the actual property of the corporations named, or upon any proportion which it bears to other property; the statute requires returns from each corporation, not of its property, but of the aggregate net value of all its policies held by residents of the Commonwealth, for the purpose of furnishing a standard or measure of a special tax or excise upon the franchises or privileges of the corporation. The only question, therefore, is whether this tax can be justified under the other clause of the Constitution, authorizing the General Court "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever," within the Commonwealth.

It has been uniformly held, since the formation of our government, that, under this provision of the Constitution, the Legislature has the power to impose an excise upon any business or calling exercised in the Commonwealth, and upon any franchise or privilege conferred by or exercised within the Commonwealth. *Portland Bank v. Apthorp*, 12 Mass. 252. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428.

The power to impose an excise upon corporations or associations engaged within this Commonwealth in the business of life insurance, whether incorporated here or incorporated elsewhere and allowed by comity to carry on business here, cannot now be doubted. The only limitation of the power is that contained in the constitutional provision, that the duty or excise shall be "reasonable."

The power to determine what callings, franchises or privileges, or, to use the language of the Constitution, "commodities," shall be subjected to an excise, and the amount of such excise, belongs exclusively to the Legislature. The provision that it must be "reasonable" was not designed to give to the judicial department the right to revise the decisions of the Legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the Legislature in determining, not only what "commodity" shall be subjected to excise, but also the amount of the excise and the standard or measure to be adopted as the foundation of the proposed excise. The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right.

Judged by these principles, the excise in controversy does not seem to us to be unreasonable and illegal. It is not unequal, but it operates alike upon all corporations or associations which exercise the franchise or function which is intended to be taxed. The mode of fixing the amount of the tax, by an assessment upon the aggregate of the net values of all the policies held by residents of the Commonwealth, is not unequal or oppressive and unreasonable.

If the whole of the business of life insurance consisted in making contracts of insurance and in paying losses, and its

franchises or functions were exhausted by these duties, the argument would be strong that this tax is unequal and unreasonable. It is not measured at all by the number of policies issued in the year for which the tax is laid. Some corporations making many contracts would not have to pay any tax, and some making fewer contracts would have to pay a large tax. As a mere excise upon the capacity or function of making contracts of insurance, its practical operation would be partial and unequal. But this is not the only important function exercised by life insurance corporations. By the growth and course of the business, and by legislation, another important function has been engrafted upon the system, that of receiving, holding, investing and managing property for the benefit of the policy holders.

The simplest form of carrying on the business of life insurance would be for the company to charge the policy holder each year with the sum which it costs to insure him for that year, which can be ascertained with reasonable certainty by the aid of the accepted tables of mortality. In such case, the relation between the parties would be merely that of insurer and insured. But the general practice of insurers is, instead of charging such sums, which would increase from year to year, to ascertain what these sums would average each year throughout an average life, and to charge each year such average sum. The necessary effect of this practice is that the insured, during the earlier years of the running of his policy, pays more than it costs to insure him, and thus the company accumulates from year to year a fund which in equity is held for the benefit of the policy holders. It is this feature of the business which gives existence to "net values" within the meaning of our statutes; the "net value" of a policy being represented by a sum which, with compound interest at the rate of four per cent per annum and with the addition of future net premiums, will provide for the payment of the policy when it matures, according to the "combined experience" or "actuaries'" table of mortality. St. 1866, c. 33. The fund thus accumulated is not regarded by our laws as the absolute property of the company, but is held by it as a quasi trustee, for the benefit of the policy holders. It has the legal title, as is the case with all trustees, but holds the property in the exercise of a franchise or function which permits it to receive, invest and

manage it for the benefit of others. If the insured violates his contract and forfeits his policy, the company cannot treat the accumulation upon his policy as its property, but holds it for his benefit.

Companies doing business upon this plan thus resemble savings banks, exercising the franchise or function of receiving, investing and managing the money of numerous policy holders. It is this franchise or function which is taxed by the statute we are considering. The words "every corporation and association engaged in the business of life insurance," do not indicate that the franchise intended to be taxed was merely the function of making contracts of insurance, but were intended to designate a class, any member of which would come within the statute, if it exercised the function which is made the subject of the excise. The essential part of the statute, assessing the excise upon the aggregate net values, shows that the Legislature did not intend that it should apply to "coöperative associations," or to any other insurance companies which conduct their business so as not to create any "net values."

The object of the Legislature was, without specifying the various forms of policies, such as "limited," "endowment" or "tontine," to impose an excise upon such associations as by virtue of their franchises exercise the function of receiving from many citizens of the Commonwealth money as trustees to invest and manage for them. This is an important function, capacity or privilege, engrafted upon and a part of the franchise exercised within this Commonwealth, upon which the Commonwealth has the constitutional power to levy a reasonable excise.

Regarding the statute as intended to tax the franchise or privilege of holding and managing the property of others, the method adopted to ascertain the value of this privilege is not unreasonable. The net value of a policy represents approximately the amounts of the payments which have been made by the holder in excess of the yearly cost of insurance, and thus the aggregate net values which furnish the basis of this tax represent approximately the amount of money of citizens of this Commonwealth, which the company has in its hands and which it is investing and managing by virtue of its franchise. It does

not seem to be an unfair measure of the value of the franchise which is taxed.

Excises similar to the one in controversy have been upheld by the court in the cases we have before cited. Thus an excise upon banks based upon the par value of the capital stock, one upon mining corporations with the same basis, one upon savings banks based upon the amount of deposits, one upon manufacturing corporations based upon the excess of the market value of the stock over the value of the real estate and machinery taxed in the place where they are situated, have been held to be within the legislative power to levy reasonable excises, and to be valid.

The plaintiffs in the cases at bar contend that this tax, though in form an excise, is covertly, but really and essentially, a tax upon the property of the policy holders held by the companies; and also that it is a tax based upon the debts of the companies, which is unreasonable.

We are not able to see the force of either of these arguments. Every excise necessarily must finally fall upon and be paid by property, and so may be indirectly a tax upon property. But, as we have before said, the Legislature clearly intended this as an excise, and not as a tax on property. It is not in terms laid upon the property or upon the policy holders; it is the corporation which is to pay it, and which is exposed to the penalties for non-payment. We must hold it to be what the Legislature has declared it to be, an excise upon a franchise or privilege of the corporation. It is true that the aggregate net value of outstanding policies represents debts or liabilities of the companies. So does the capital stock of a corporation, and, what is more nearly analogous to these cases, so do the deposits of a savings bank. But this is immaterial, if they also furnish a fair basis by which to estimate the value of the franchise or privilege of the corporation, which the Legislature in the exercise of its discretion desires to subject to an excise. The record and the arguments of counsel present details of the operation of this statute, which is claimed to work hardships upon the insurers; but we do not discuss them, because we have nothing to do with the policy or expediency of the law, or with the question whether it is satisfactory to insurers or insured. These are matters for legislative

judgment and discretion. Upon the whole case, judging of this statute by the principles of constitutional construction heretofore adopted by the court, we are of opinion that it is an enactment within the power conferred by the Constitution upon the Legislature to levy reasonable excises, and is therefore valid, both as to domestic corporations, which derive their authority to exercise the franchise taxed by grant from the State, and as to foreign corporations, which are permitted to exercise the same franchise here by the comity of the State, upon such conditions as it sees fit to prescribe.

Judgment for the defendants.

W. G. Russell & J. Fox, for the plaintiff in the first case.

J. C. Ropes & W. C. Loring, for the plaintiff in the second case.

G. Marston, Attorney General, (*C. H. Barrows*, Assistant Attorney General, with him,) for the defendants.



NEW YORK AND NEW ENGLAND RAILROAD COMPANY
vs. OTIS DRURY, administrator.

Suffolk. March 24. — June 29, 1882. FIELD & C. ALLEN, JJ., did not sit.

After a railroad corporation had filed a location of its railroad over A.'s land, A. conveyed a portion of the land to B. by a warranty deed containing a covenant against incumbrances. Both A. and B. filed petitions against the corporation for the assessment of damages for the land taken; and, B. having become insolvent, his assignee assigned to the corporation the claim of B. under his petition for the land taken and damages caused by the laying out of the railroad, with full power to prosecute the petition to final judgment, and to avail itself of all remedies both in law and in equity in relation to said claim. A. subsequently recovered judgment against the corporation for damages for all the land taken. *Held*, on a bill in equity by the corporation against A., to restrain him from enforcing his judgment so far as the damages sustained by B.'s land were concerned, that the claim of B. against A. for breach of the covenant of warranty did not pass by the assignment to the corporation; and that the bill could not be maintained.

MORTON, C. J. The Midland Railroad Company in 1851 filed a location of its railroad over a tract of flats belonging to Cyrus Alger, of whose estate the defendant is the administrator. In 1853, Cyrus Alger conveyed by warranty deeds, containing

covenants against incumbrances, a portion of said flats to Henry S. Washburn, and another portion to Edward Reed and Cyrus Alger, Jr. In 1854, the Boston and New York Central Railroad Company, the successor of the Midland Railroad Company, filed a new and amended location crossing the lots of Alger and of his grantees. Immediately after the new location was filed, Alger, Washburn, and Reed and Alger severally filed petitions to the county commissioners to recover damages for the land taken. Alger having died, the defendant, as his administrator, prosecuted his petition, and recovered before a jury in the Superior Court a verdict of \$32,625, for all the damages sustained by Alger by the location of 1851, which verdict was afterwards affirmed by this court. *Drury v. Midland Railroad*, 127 Mass. 571.

The plaintiff in the case before us, having by several mesne conveyances acquired all the franchises, rights and property of the Midland Railroad Company, subject to all its obligations and liabilities, was the real defendant in that case, and was held to be liable for the damages sustained by Alger; and it was also held that Alger, being the owner in fee of all the land at the time the location was filed, in 1851, was entitled to recover the whole damages to all the land.

Under the direction of the presiding justice of the Superior Court, the jury made separate findings, apportioning the damages to the two lots conveyed by Alger to Washburn and to Reed and Alger, stating in their finding the amount of damages sustained by each.

Washburn and Reed and Alger became insolvent, and their assignees, in 1866, executed the assignments of their claims under their petitions for compensation above referred to, which assignments will be hereafter considered.

After the decision in the former case, the plaintiff brought this bill in equity, in which it seeks to restrain the defendant from collecting that part of his verdict which was for the damages to the two lots sold by Alger, or for a decree that he shall hold that part of his verdict in trust for the plaintiff.

The plaintiff contends that the subsequent conveyances of Alger, with covenants against incumbrances, operated as equitable assignments to his grantees of his claim for damages on

account of the land conveyed; and that it has acquired the rights of such grantees by the assignments made by their assignees. But the first difficulty of the plaintiff's position is, that it does not appear that it has acquired any rights which Washburn or Reed and Alger may have against Alger under the covenants of his deeds. The assignments by the assignees did not convey to it any such rights. The two assignments, though differing slightly in language, are the same in legal effect. The assignees of Washburn "sell, assign, transfer and set over to the Boston, Hartford and Erie Railroad Company, our claim as assignees of the estate of Henry S. Washburn, insolvent debtor, against the Boston and New York Central Railroad Company, for land taken and damages caused by the laying out, making and maintaining its railroad, as set forth in his petition to the county commissioners of the county of Norfolk, and authorize the said Boston, Hartford and Erie Railroad Company to prosecute the said petition to final judgment, and avail themselves of all remedies, both in law and equity, in relation to said claim, as fully as we could have done, had we not made this assignment."

This does not purport to transfer any claim which Washburn may have had against Alger for a breach of his covenant of warranty. It purports merely to transfer his claim for land damages, as set forth in his petition to the county commissioners. Under that petition, Washburn could not maintain any claim for damages to his land caused by the taking in 1851. At that time he had no interest in the land, legal or equitable. The title of the railroad was acquired when the location was filed. Alger was then the sole owner of all the land described in his petition, and he alone was the proper party to recover damages for that location. *Boynton v. Peterborough & Shirley Railroad*, 4 Cush. 467. *Moore v. Boston*, 8 Cush. 274. *Old Colony Railroad v. Miller*, 125 Mass. 1. *Drury v. Midland Railroad*, *ubi supra*.

His subsequent grantees could not recover any damages for the taking in 1851 under their petitions. They could only recover for damages caused by the new location in 1854. It does not clearly appear whether the new location took more of the land of Washburn and of Reed and Alger than the first one did. If it did, they would be entitled under their petitions to recover

for the land thus taken; if it did not, they might be able to recover only nominal damages. But their assignees only transferred the claims, whether great or small, which they made, and which they could enforce under these petitions. Any claims which they had against Alger for breaches of his covenants were not assigned to the plaintiff. Without considering whether such subsequent conveyances operated as equitable assignments, of a part of the land damages which Alger was entitled to recover, to his grantees, it is clear that the present plaintiff cannot maintain this bill.

Bill dismissed.

R. R. Bishop & G. Wigglesworth, for the plaintiff.

W. Gaston & J. C. Coombs, for the defendant.

BROADWAY NATIONAL BANK *vs.* CHARLES W. ADAMS
& another.

Suffolk. November 17, 18, 1881; March 27. — June 29, 1882.

A person having the entire right to dispose of property may settle it in trust in favor of another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation of the estate in such an event.

MORTON, C. J. The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of seventy-five thousand dollars to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof, semiannually, to my said brother Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of

said seventy-five thousand dollars shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said seventy-five thousand dollars, together with any accrued interest or income thereon which may remain unpaid, as herein above directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that, if the trustee was to pay the income to the plaintiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of his will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. *Braman v. Stiles*, 2 Pick. 460. *Perkins v. Hays*, 3 Gray, 405. *Russell v. Grinnell*, 105 Mass. 425. *Hall v. Williams*, 120 Mass. 344. *Sparhawk v. Cloon*, 125 Mass. 263.

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Lit. 223 a. *Blackstone Bank v. Davis*, 21 Pick. 42.

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and puritie of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of

one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in *Sparhawk v. Cloon*, above cited, from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. *Brandon v. Robinson*, 18 Ves. 429. *Green v. Spicer*, 1 Russ. & Myl. 395. *Rochford v. Hackman*, 9 Hare, 475. *Trappes v. Meredith*, L. R. 9 Eq. 229. *Snowdon v. Dales*, 6 Sim. 524. *Rippon v. Norton*, 2 Beav. 63.

The English rule has been adopted in several of the courts of this country. *Tillinghast v. Bradford*, 5 R. I. 205. *Heath v. Bishop*, 4 Rich. Eq. 46. *Dick v. Pitchford*, 1 Dev. & Bat. Eq. 480. *Mebane v. Mebane*, 4 Ired. Eq. 131.

Other courts have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts. *Holdship v. Patterson*, 7 Watts, 547. *Shankland's appeal*, 47 Penn. St. 113. *Rife v. Geyer*, 59 Penn. St. 393. *White v. White*, 30 Vt. 338. *Pope v. Elliott*, 8 B. Mon. 56. *Nichols v. Eaton*, 91 U. S. 716. *Hyde v. Woods*, 94 U. S. 523.

The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semiannually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the *cestui que trust* which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds

are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case. But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows that, under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him.

Bill dismissed.

The case was argued at the bar in November 1881, and re-argued in March 1882, by *J. R. Churchill*, for the plaintiff; by *R. D. Smith & W. W. Vaughan*, for the defendant Adams; and by *E. F. Hodges*, for the trustee.

PACIFIC NATIONAL BANK vs. ADELAIDE WINDRAM & others.

Suffolk. March 22, 23. — June 29, 1882. ENDICOTT & FIELD, JJ., absent.

A person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation, so as to prevent his creditors from reaching the income by a bill in equity under the Gen. Sts. c. 113, § 2, *cl.* 11; and this rule applies to a married woman settling her separate property after marriage, where she has by law the right to make contracts as if she were sole.

If a person, having made a settlement in trust of his own property by which he is entitled to the income, assigns his interest under the settlement as security for a debt, he cannot, as against the creditor, subsequently modify the terms of the trust, so as to make the payment of the income discretionary with the trustee.

MORTON, C. J. The defendant, Mrs. Windram, after her marriage, being possessed in her own right of personal property, conveyed it to trustees by an indenture dated in March 1879. The trusts declared by the indenture are, that the trustees are to pay the net income to her semiannually during her life "upon her sole and separate order or receipt, the same not to be by way of anticipation," and to pay the principal to her children upon her death, or when, after her death, they arrive at the age of thirty years, except as to a sum not exceeding twenty-five thousand dollars, over which she retains a power of appointment by will.

After this settlement in trust, she jointly with her husband borrowed a large sum of money of the plaintiff, and, as security therefor, assigned and transferred to the plaintiff, by an instrument in which her husband joined, all her right and interest to and in the income of said trust fund accruing under the said indenture. The object of this bill in equity, which is brought under the Gen. Sts. c. 113, § 2, *cl.* 11, is to reach and apply, in payment of the plaintiff's debt, the income to which she became

entitled under the indenture after the assignment to the plaintiff. The provision that the trustees are to pay the net income to her upon her sole receipt, and not "by way of anticipation," is clearly intended to restrain the power of the *cestui que trust* to alienate the income in advance; and the case therefore raises the question, whether such restraint of alienation is valid as against subsequent creditors or purchasers with notice.

It was decided in the case of *Broadway National Bank v. Adams*, ante, 170, that the founder of a trust for the benefit of another may by suitable provisions restrain the power of the *cestui que trust* to alienate the income by anticipation, and protect the income from the claims of his creditors until it is paid over to him. In that case, it was not necessary to consider whether a man could settle his own property in trust to pay the income to himself with a like restraint of alienation which would be valid. It seems to us that the two questions are quite different.

The general policy of our law is, that creditors shall have the right to resort to all the property of the debtor, except so far as the statutes exempt it from liability for his debts. But this policy does not subject to the debts of the debtor the property of another, and is not defeated when the founder of a trust is a person other than the debtor. In such case, the founder, having the entire *jus disponendi* in disposing of his own property, sees fit to give to his beneficiary a qualified and limited, instead of an absolute, interest in the income. Creditors of the beneficiary have no right to complain that the founder did not give his property for their benefit, or that they cannot reach a greater interest in the property than the debtor has, or ever had. But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is, that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts.

To permit a man thus to attach to a valuable interest in property retained by himself the quality of inalienability and of

exemption from his debts, seems to us to be going further than a sound public policy will justify. No authorities are cited in favor of such a rule. In England it is the settled rule that the founder of a trust in favor of a third person (except married women) cannot, by a clause restraining alienation, put the income out of the reach of the creditors of the beneficiary. See cases cited in *Broadway National Bank v. Adams*, ante, 170.

In Pennsylvania, where the English rule is rejected, and the same rule, as to the power of a founder of a trust in favor of a third person, adopted by us in *Broadway National Bank v. Adams*, is upheld, the courts yet hold that a person cannot so settle his own property in trust, as to put his right to the income retained by him beyond the reach of his creditors, by a provision against alienation or otherwise. *Johnston v. Harvy*, 2 Penn. 82. *Mackason's appeal*, 42 Penn. St. 330. See also *Lackland v. Smith*, 5 Mo. App. 153.

It is true that a man, who is not indebted, may by a voluntary conveyance made in good faith transfer his property so as to put it out of the reach of future creditors. When a man transfers a trust fund, of which the income is to be paid to him during his life, and the principal at his death to be paid or transferred to others, the principal may be beyond the reach of his future creditors; but we are of opinion that his right to the income which he retains in himself may be alienated by him, is liable for his debts, and may be reached in equity.

Another question, not free from difficulty, arises in this case, and that is whether this rule applies in the case of a conveyance of her property in trust by a married woman. In England, where, as we have before said, the general rule is that restraints of alienation in wills or deeds are invalid, the Court of Chancery from the time of Lord Thurlow has recognized an exception to the rule in favor of married women. *Parkes v. White*, 11 Ves. 209. *Jackson v. Hobhouse*, 2 Meriv. 483. *Woodmeston v. Walker*, 2 Russ. & Myl. 197. Numerous other cases might be cited.

The reason of the exception is, that a married woman is not *sui juris*, and that such a restraint of her power of alienation is necessary as a protection to her against the coercion and influence of her husband.

By the common law of England, a married woman could not hold any separate property. The settlement upon her by means of a trust of an equitable separate estate, was the invention of equity, and the Court of Chancery allowed the clause against anticipation, in order to give full effect to the estate itself, and to secure to her, free from the influence of the husband, the benefit intended by the settler.

But the legislation of this Commonwealth has essentially changed the common law status of a married woman, especially in respect to her holding separate property. By our statutes, a married woman is now enabled to take, hold, manage and dispose of property, to make contracts, and to sue and be sued, in the same manner as if she were sole. Pub. Sts. c. 147. Except as to dealings with her husband, she is made a person *sui juris*. The statute intends, what it declares, that she shall hold her separate property in the same manner as if she were sole, with the same rights and privileges, and also subject to the same rules, responsibilities and liabilities, as a feme sole.

Courts of equity upheld the restraint of alienation in favor of a married woman because of her disability during coverture, and as an incident of the trust estate necessary for her protection. The statutes having removed her disability, and having made unnecessary the creation of a trust estate, the incidents of the trust estate and the equitable rights growing out of it no longer remain in her favor. She is put upon the same footing as if she were a feme sole. She no longer needs any protection against the marital rights of her husband. It is argued that she still needs protection against his persuasion and undue influence. The statutes have made such provisions as were deemed necessary to meet this danger, by providing that, upon her application to the Supreme Judicial Court, a trustee may be appointed, and she may thereupon convey her separate estate to the trustee upon such trusts and to such uses as she may declare. Pub. Sts. c. 147, § 13.

For these reasons, we are of opinion that the provision in the indenture of March 1879, intended to restrain Mrs. Windram's power of alienating the income of the trust fund, is invalid; and that the plaintiff is entitled to the income after the assignment

to it, or after notice thereof was given to the trustees, if they have paid it to Mrs. Windram before such notice.

We need not consider what effect the modification of the trusts made in September 1880 may have upon the rights of other parties. By this modification, the trustees, instead of paying the income to Mrs. Windram, were to disburse it for her benefit, as they should see fit. It is clear that it would be a gross fraud to allow it to defeat the rights of the plaintiff under its prior assignment, and the presiding justice who heard the case rightly ruled that it was incompetent and immaterial as against the plaintiff.

The result is, that the plaintiff is entitled to a decree, the terms of which must be settled before a single justice.

Decree for the plaintiff.

E. S. Mansfield, for the plaintiff.

A. S. Wheeler & J. H. Young, for the defendants.



ELIZABETH T. FOSTER vs. DAVID W. FOSTER & others.

Suffolk. March 27. — June 29, 1882. ENDICOTT & FIELD, JJ., absent.

The interest of a person in a trust fund created for his benefit by the will of another, which provides that the trustees may in their discretion pay or apply the income to the benefit of such person, or the members of his family, as the trustees may think proper, and that the income shall not be subject to his debts or assignable by him by way of anticipation, cannot be reached by a creditor of such person by a bill in equity, under the Gen. Sts. c. 113, § 2, *cl.* 11.

BILL IN EQUITY, under the Gen. Sts. c. 113, § 2, *cl.* 11, against David W. Foster, James Wyman and James Foster, to reach and apply, in payment of instalments of alimony due to the plaintiff from James Foster, her former husband, his interest in a trust fund held by the other defendants under the will of John H. Foster, the father of James Foster. The defendants demurred to the bill for want of equity. At the hearing, the demurrer was sustained and the bill dismissed; and the plaintiff appealed to the full court. The material provisions of the will appear in the opinion.

E. S. Mansfield, for the defendants.

F. A. Perry, for the plaintiff.

MORTON, C. J. Assuming that the plaintiff stands in the same position and has the same rights as any other creditor of James Foster, it is clear that this bill cannot be maintained.

The will of John H. Foster, the father of James, creates a trust fund for the benefit of James, but it expressly provides that the trustees may at their discretion pay or apply the income of the fund to the personal benefit or comfort of said James, or such member or members of his immediate family, as the trustees may think proper, and that such income shall not be subject to his debts or assignable by him by way of anticipation. It follows under the decisions of this court, that James took no absolute right in the income which he can assign, or which a creditor of his can reach. *Hall v. Williams*, 120 Mass. 844. *Broadway National Bank v. Adams*, ante, 170.

Bill dismissed.

EDWARD RUSSELL & another *vs.* THOMAS S. MILTON
& others.

Suffolk. March 27. — June 29, 1882. ENDICOTT & FIELD, JJ., absent.

A testator gave the residue of his property to trustees upon the trusts, first, to pay all the income to his widow during her life; second, upon her death, to divide the trust estate into as many parts as there were children of him and his wife then living, and deceased leaving issue then living; and third, to hold one of said parts in trust for his son T. and to pay him semiannually the net income arising therefrom to a certain amount annually, and, in the discretion of the trustees, to further pay him the excess of the net annual income above the amount named; with a limitation over, upon the death of T., of the principal and accumulated income. Within a month after the will was proved, before the estate was settled and before any property was transferred to the trustees, and while the widow was living, a creditor of T. brought a bill in equity, under the Gen. Sts. c. 118, § 2, *c.* 11, to reach and apply to the payment of his claim the interest of T. in the trust fund. *Held*, that the bill could not be maintained.

MORTON, C. J. The will of William H. Milton, after providing for an annuity to his sister, gives the residue of his property to trustees. The trusts upon which the estate is settled, so far as necessary to be stated for the purposes of this case, are,

first, that the trustees shall pay all the income to his widow, Amelia Milton, for her life, "trusting that she will do with said income all that is necessary during her life toward the support of our beloved children;" second, upon the death of the widow, the trustees are "to divide said trust estate into as many parts as there are children of me and my said wife then living, and deceased leaving issue then living;" and third, to hold one of said parts in trust "for my son Thomas S. Milton if then living, and to pay him semiannually the net income and interest arising therefrom during his life to the extent of four thousand dollars annually, and further to pay him semiannually the excess of the said net annual income above four thousand dollars, if any, if and to such extent as in the judgment of my said trustees the then conduct of said Thomas S. Milton shall deserve it;" with a limitation over upon the death of said Thomas S. Milton of the principal and accumulated income.

The object of this bill in equity is to reach and apply the interest of Thomas S. Milton under these provisions to the payment of a debt due by him to the plaintiff.

The bill was brought within a month after the will was proved, before the estate was settled, and before any property was transferred to the trustees. The widow of the testator is still living. We do not deem it necessary to decide whether, under the provisions of this will, Thomas S. Milton takes any estate which vests in him before the death of his mother. Assuming that he takes an estate in the nature of a vested interest in an equitable contingent remainder, which he could assign, we are of opinion that it is not such an estate as is within the contemplation of the statute upon which the plaintiff relies. Gen. Sts. c. 113, § 2, *cl.* 11. Pub. Sts. c. 151, § 2, *cl.* 11. Even if the trust fund had been transferred to the trustees, they would be required to pay the whole of the income to the widow of the testator, and could not appropriate any part of it to the payment of the plaintiff's debt.

No decree for the present application of any part of the income could be made against the trustees, and the statute does not contemplate that the court can order the trustees to pay at a remote and uncertain time the income which may then be payable to the debtor. *Bartholomew v. Weld*, 127 Mass. 210.

The only other decree which could be entered would be a decree against the defendant Milton alone, requiring him to transfer his interest under the will to the plaintiffs, or authorizing a sale of it by auction or otherwise.

The purpose of the statute is to reach property of the debtor in the hands of a third person, which cannot be come at to be attached or taken on execution, and not to compel a debtor to assign and apply to the plaintiff's debt property under his control or in his hands, the proceeding being in the nature of an equitable trustee process as distinguished from a creditor's bill. *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558.

In the case before us, it is not in the power of the debtor to obtain anything under his father's will to apply to the plaintiff's debt. It would work a great and unconscionable hardship upon him to order a sale of his estate. His interest, if vested, is uncertain and contingent; it has no market value, and any purchase of it would be a mere speculative venture. We do not think the statute contemplates that such an uncertain contingent and speculative interest can be seized and sold by a creditor by proceedings in equity.

Bill dismissed.

C. H. Hill & W. S. Macfarlane, for the plaintiffs.

T. P. Proctor, for the defendants.

DANVERS SAVINGS BANK vs. EDWARD THOMPSON & another.

Suffolk. March 20, 21. — June 29, 1882. ENDICOTT & LORD, JJ., absent.

A., a citizen of this Commonwealth, brought a bill in equity against B., a citizen of another State, and C., a citizen of this Commonwealth. B. filed a petition for the removal of the case into the Circuit Court of the United States, under the act of Congress of March 3, 1875, which was denied, on the ground that, as A. and C. were both citizens of this Commonwealth, and as the controversy between A. and B. could not be fully and finally determined as between them without the presence of C., B. had no right to remove the case. B. then filed an application for a rehearing upon his petition for removal, alleging that, after the filing and service of the bill, and before the filing of the petition for removal, C. wholly released all his interest in the subject matter of the controversy to A., and ever since such release A. and B. had been the only parties interested in the cause; and that B. had no information or suspicion that the release had been executed before the decision denying the petition for removal,

and A., although cognizant thereof, did not disclose the fact to B. or to the court. A. admitted that the facts alleged in the application for a rehearing were true. *Held*, that the former rescript and order should be vacated; and that the petition for removal should be allowed.

MORTON, C. J. When this case was before us at a former term, it was made to appear that Tufts was a real defendant in the action; and it was held that, as the plaintiff and Tufts were both citizens of Massachusetts, and as the controversy between the plaintiff and Thompson could not be fully and finally determined, as between them, without the presence of Tufts, Thompson had no right to remove the case into the Circuit Court of the United States under the act of Congress of March 3, 1875. *Danvers Savings Bank v. Thompson*, 130 Mass. 490.

Since then, the defendant Thompson has filed an application for a rehearing upon his petition for removal, and in his application alleges that, after the filing and service of the bill, and before the filing of said petition for removal, the defendant Tufts wholly released all his interest in the certificates in controversy and in the subject matter of this suit to the plaintiff, and ever since said release the plaintiff and this defendant have been the only parties interested in this cause; and that this defendant had no information or suspicion that the release had been executed, before the decision denying the petition for removal, and the plaintiff, though fully cognizant thereof, did not disclose the fact to this defendant or to the court.

The application was presented to a single justice, and, the plaintiff admitting that the facts therein alleged were true, the justice reported the questions arising thereon to the full court. Strictly speaking, the application should have been made directly to the full court, the final order denying the petition for removal being an order of the full court, which a single justice could not vacate or set aside. But this is mere matter of form, and we treat the application reported to us by the justice as if it had been a petition made directly to the full court to rehear the case and vacate its rescript.

Taking the original petition and this application for a rehearing, which is to be regarded as practically an amendment of it, with the admissions of the plaintiff, the record shows that at the time Thompson filed his petition for removal he was the

only real defendant, and that the only controversy in the case was between him and the plaintiff. In determining whether a party has the right of removal, the court looks to the real controversy at the time of the petition for removal, and not to the mere form of the pleadings. If the record, of which the petition is a part, shows that all the parties on one side of the controversy are citizens of one State, and all the parties on the other side are citizens of a different State, the suit may be removed. *Amory v. Amory*, 95 U. S. 186. *Removal cases*, 100 U. S. 457. *Barney v. Latham*, 103 U. S. 205.

The defendant Thompson filed his petition for removal in due time. At the time it was filed, he was entitled, upon the real facts of the case, to invoke the jurisdiction of the federal courts, he and the plaintiff being citizens of different States. The concealment by the plaintiff of a vital fact ought not to prejudice the defendant. It was a fraud upon him and upon the court.

We are of opinion that, upon the discovery of the real facts, the defendant became entitled to a rehearing upon his petition for removal; and that the former rescript and order should be vacated and set aside.

The parties have argued, not only the question whether the application for a rehearing should be entertained, but also the question whether, if it is received, the record shows a case which entitles the defendant to remove the case to the Circuit Court. Being of opinion, as before stated, that the record does now show a case for removal, the entry should be

Petition for removal granted.

R. M. Morse, Jr., for the defendant Thompson.

A. S. Wheeler & E. W. Hutchins, for the plaintiff.

CHARLES H. COOKE vs. BOSTON AND LOWELL RAILROAD CORPORATION.

Middlesex. January 30. — June 27, 1882.

The charter of a railroad corporation provided that, if the railroad should cross any highway, the railroad should be so constructed as not to impede or obstruct the safe and convenient use thereof; that the corporation should have the power to raise or lower such highway, and, if it should do so, and should not so raise or lower the same as to be satisfactory to the selectmen, the latter might require in writing of the corporation such alteration or amendment as they might think necessary; and that, if the required amendment or alteration was reasonable and proper, and the corporation should unnecessarily and unreasonably neglect to make the same, the selectmen might proceed to make such alteration or amendment, and might recover the cost thereof from the corporation. *Held*, in an action for personal injuries, occasioned by the defective construction of a bridge built and maintained by the corporation over a highway, at a place where the highway had not been raised or lowered, that, under its charter, the corporation was bound so to construct and keep its railroad as not to impede or obstruct the safe and convenient use of the highway; and that, even if the bridge was adequate for such use when built, and an increased use rendered it inadequate, the corporation must alter the bridge.

TORT for personal injuries occasioned to the plaintiff, on May 8, 1880, by the defective construction of a bridge built and maintained by the defendant corporation in Winchester. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, upon agreed facts, in substance as follows:

At the time of the accident the plaintiff, who was accustomed to the management of horses, and to driving horses in all kinds of vehicles, was driving an omnibus drawn by two horses along the north side of Cross Street, a highway in Winchester, about half past one o'clock in the morning of the day above named, it being dark at the time. He did not see the bridge in question, which extends over and spans Cross Street, until he reached it. He then leaned over on his seat, on his right side, when his left shoulder came in contact with a large joist, which was one of the supports of the planking of the bridge, and was nine feet and two inches above the road, and was distant about eight feet from the end of the bridge; and he received the injuries complained of. His horses, which were walking at the time, stopped; and he was using due care.

There was a light in the front part of the omnibus, under the foot rest, but it did not disclose the bridge to the plaintiff. He had never before driven an omnibus on Cross Street, but had driven over the street and under the bridge three or four times in a buggy. The omnibus was eight feet and nine inches high.

Cross Street has been used by the public for travel for more than two hundred years. Under the bridge, and for a short distance on each side, Cross Street has two paths or ways wrought for carriage travel; that on the south side being about six inches lower than the one on the north side, thus rendering the bridge higher above the south driveway than the north driveway, and thus allowing more space for vehicles to pass under the bridge on the south driveway than on the north driveway. The two ways thus constructed and maintained are separated from each other by the stone supports of the bridge, and vehicles cannot pass from one to the other under the bridge. The defendant was incorporated by the St. of 1830, c. 4.

These ways were so constructed and graded by the defendant when the railroad was built, in 1832, and have been kept substantially the same ever since. The grade of the railroad has never been changed at that place. The location of the railroad is there six rods in width, the bridge being in the centre of the location. The bridge has been maintained by the railroad corporation as a part of its railroad. On May 19, 1880, the plaintiff gave to the defendant a written notice of the time, place and cause of the accident, in accordance with the statute.

If, upon these facts, the plaintiff was entitled to recover, judgment was to be entered for him in the sum of \$500; otherwise, for the defendant.

T. H. Sweetser & G. A. A. Pevey, for the defendant.

J. W. Johnson, (E. F. Johnson with him,) for the plaintiff.

C. ALLEN, J. It is by implication conceded by the defendant that, at the time of the injury received by the plaintiff, the highway at the crossing was not safe and convenient; and the defence rests upon the ground that the town, and not the railroad company, was bound to keep the highway in a safe condition. It was contended that, under § 11 of the defendant's charter, St. 1830, c. 4, it was for the selectmen of the town to say whether

or not the manner of constructing the railroad at that point was satisfactory to them, and, if not, to make it so, and to recover the cost of so doing from the railroad company; and that the utmost that the railroad company was required to do by said section was to construct its road in a reasonable and proper way, satisfactory to the selectmen, whose approval must now be assumed after so great a lapse of time.

But we are of opinion that such is not the true construction of the statute. Section 11 provides that, if the railroad shall cross any highway, the railroad shall be so constructed as not to impede or obstruct the safe and convenient use thereof; and that the corporation shall have the power to raise or lower such highway; and if it shall raise or lower such highway, and shall not so raise or lower the same as to be satisfactory to the selectmen, said selectmen may require in writing of the corporation such alteration or amendment as they may think necessary; and, if the required amendment or alteration be reasonable and proper, and the corporation shall unnecessarily and unreasonably neglect to make the same, the selectmen may proceed to make such alteration or amendment, and may recover the cost thereof from the corporation.

It thus appears, in the first place, that the selectmen have power to interfere only in a case where the corporation has raised or lowered the highway; and it is not distinctly found in this case that the defendant corporation at the crossing in question did raise or lower the highway. The statement that "these ways were so constructed and graded by the defendant when the railroad was built, in 1832, and have been kept substantially the same ever since," does not necessarily or fairly imply that the highway was raised or lowered; and the further fact, which is stated, that "under the bridge, and for a short distance on each side, Cross Street has two paths or ways wrought for carriage travel; that on the south side being about six inches lower than the one on the north side, thus rendering the bridge higher above the south driveway than the north driveway," does not necessarily imply that the highway was raised or lowered in either of the driveways, and especially does not enable us to perceive that it was so raised or lowered in that driveway where the plaintiff's injury was received. If the elevation of

the highway was changed at all, it may have been in the other or south driveway.

But, in the second place, even in a case where the selectmen are not satisfied with the manner of constructing a crossing, their determination upon the question is not conclusive. They may require in writing of the corporation such alteration as they may think necessary; but if the corporation neglects to make the same, it is only in cases where the required alteration is in fact reasonable and proper that the selectmen may proceed to make the same, and recover the cost from the corporation. The words "if the required alteration be reasonable and proper" necessarily submit the determination of that question to another tribunal than the selectmen themselves, namely, to the court. *Commonwealth v. New Bedford Bridge*, 2 Gray, 389. This case, therefore, is not like cases where, under the statutes, selectmen may or must determine in advance, and prescribe the method of doing certain acts which might otherwise be deemed unlawful obstructions to highways. *Young v. Yarmouth*, 9 Gray, 386. *Commonwealth v. Boston*, 97 Mass. 555. *Cushing v. Bedford*, 125 Mass. 526. This construction of this same statute was also given by this court, in *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24.

It is further contended by the defendant, that the highway was graded and constructed, at the place of the injury, in view of the probable travel upon the same, and suitable for all kinds of conveyances then in use, and that such an omnibus as the plaintiff was using was not in existence or contemplated at that time, and that, if the mode of travel changes, the charter does not oblige the railroad corporation to provide for the future wants of travellers. The agreed statement of facts, however, does not show what kinds of conveyances were in use in 1882; nor can we accept that construction of the statute which would limit the duty and obligation of the railroad company to providing for the wants of travellers at that time. The Legislature intended to provide against any obstruction of the safe and convenient use of the highway, for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration

as will meet the present needs of the public who have occasion to use the highway. The case of *Commonwealth v. New Bedford Bridge, ubi supra*, is closely in point, and renders unnecessary any further discussion of the reasons for this construction of the statute.

Judgment for the plaintiff affirmed.

NEPONSET MEADOW COMPANY *vs.* FRANK L. TILESTON
& another.

Norfolk. Jan. 27, 1881; March 7. — June 26, 1882. ENDICOTT & DEVENS,
JJ., absent.

The St. of 1876, c. 75, authorizing the owners of meadow lands lying on each side of the Neponset River to form a corporation for the purpose of draining and improving the meadows, and providing that the act shall take effect on its acceptance by a less number than all the owners, is unconstitutional, so far as it authorizes the corporation to maintain complaints under the mill act, Gen. Sts. c. 149, for flowing the meadows of owners who have not assented to the act.

COMPLAINT under the mill act, Gen. Sts. c. 149, for flowing certain meadow lands on the Neponset River. The case was submitted on agreed facts to the Superior Court, which ordered judgment for the respondents; and the complainant appealed to this court. The facts, so far as material to the point decided, appear in the opinion.

The case was argued at the bar in January 1881, by *L. M. Child*, for the complainant, and by *W. Gaston & A. Churchill*, for the respondents; and was reargued in March 1882, by *B. F. Butler & Child*, for the complainant, and by *Gaston & Churchill* for the respondents.

MORTON, C. J. The St. of 1876, c. 75, makes the owners of the meadow lands lying on each side of Neponset River, within certain defined limits, a corporation by the name of the Neponset Meadow Company, for the purpose of draining and improving the said meadows. The purposes of the act and the general powers conferred upon the corporation seem to be substantially the same as are provided for in the General Statutes relating to

"improving meadows and swamps." Gen. Sts. c. 148. Pub. Sts. c. 189.

But this act provides that the corporation "shall have power to prosecute and maintain complaints under chapter one hundred and forty nine of the General Statutes," a power not contained in the Gen. Sts. c. 148, or in any other private statute to which our attention has been called. The act does not purport to transfer the title in the meadows to the corporation, and it cannot be contended that the Legislature has the constitutional power to transfer the title of the owners to the corporation against their consent, without making any provision for compensation. The object was to make them a proprietary, to enable a large number of meadow owners conveniently to manage their estates for the common benefit. *Holland v. Cruft*, 8 Gray, 162. The only power, therefore, which the complainant has to maintain the complaint in this case, is derived from the provision of the act of incorporation above cited.

It is clear that the intention of the Legislature was to give to the corporation the exclusive right to maintain complaints under the mill act, and that a recovery of judgment by the corporation would bar the rights of the several meadow owners to maintain such complaints. Otherwise, the effect of the statute would be to make the mill owner liable twice for the same damage, to the corporation and to the owners of the meadows flowed.

By the terms of the act, it is not to take effect until accepted by three quarters of all the meadow owners; and it is admitted, as one of the facts in this case, that there are several owners of meadow lands described in said act and in the complaint who do not accept or assent to said act.

If the provision authorizing the corporation to maintain complaints under the mill act is unconstitutional and void as to such dissenting meadow owners, they would not be precluded, by a judgment obtained by the complainant in this case, from bringing and maintaining complaints for the damage to their meadows; and it follows that the respondents must ask for a determination of the question of the constitutionality of this provision as to dissenting owners, in order to protect themselves from the liability to pay double damages.

It cannot be questioned that the right to recover damages for flowing a man's land is a valuable right of property vested in him. The Legislature cannot take this right of property from him and confer it upon another man or corporation, unless it takes it for some public use. *Morse v. Stocker*, 1 Allen, 150. *Talbot v. Hudson*, 16 Gray, 417. And if, by an act of the Legislature, private property is taken for a public use, the act must provide for an adequate compensation to the owner for the property taken, or it is in violation of the Constitution and void. *Boston & Lowell Railroad v. Salem & Lowell Railroad*, 2 Gray, 1. *Haverhill Bridge v. County Commissioners*, 103 Mass. 120. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50.

The statute we are considering authorizes the corporation to prosecute and maintain complaints under the mill act for damages to all the meadows described in it. It is to recover judgments in such suits, and to receive and hold the damages recovered. No provision is made that it is to receive and hold them for the benefit of the several meadow owners, and no provision is made for compensation to them for the property thus taken from them and vested in the corporation. If the statute can be regarded as authorizing a taking for a public use, yet there is the fatal difficulty that it makes no provision for compensation.

For these reasons, without considering the other objections raised to the statute, we are of opinion that the provision authorizing the corporation to prosecute and maintain complaints under the Gen. Sts. c. 149 is unconstitutional and void, and therefore that this complaint cannot be maintained.

• *Judgment affirmed.*

COMMONWEALTH *vs.* EDWARD J. COSTELLO.
SAME *vs.* EVAN JONES.

Norfolk. March 28. — June 27, 1882. ENDICOTT & FIELD, JJ., absent.

The St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, providing that no person licensed to sell spirituous and intoxicating liquors shall maintain or permit to be maintained, upon premises used by him under his license, screens or blinds, which shall interfere with a view of the business conducted upon the premises, creates a substantive offence; and it is not necessary to allege in a complaint under said statutes that the defendant has violated the conditions of his license, or that he has sold spirituous and intoxicating liquors in violation of law.

At the trial of a complaint under the St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, alleging the unlawful placing and maintaining of blinds, on a certain day, on premises used by the defendant for the sale of spirituous and intoxicating liquors under a license, there was evidence of the sale of liquor in the licensed room three days before the day named in the complaint, and that, on the evening of the day named in the complaint, the rooms were lighted and voices were heard in the building, which the witness believed came from the bar-room. The judge refused to instruct the jury that there was no evidence that the defendant was carrying on business on the premises described in the complaint, but left the question to the jury under instructions not objected to; and, at the request of the defendant, further instructed the jury that the government must prove beyond a reasonable doubt that the business of selling spirituous and intoxicating liquors was being carried on at the time set forth in the complaint; and that this was not to be presumed from the fact that the defendant had a license to sell such liquors. *Held*, that the defendant had no ground of exception.

A complaint, under the St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, alleged that the defendant was licensed to sell spirituous and intoxicating liquors in a certain room in a certain building, which said room was used by him for the sale of such liquors under his license; and that he unlawfully maintained "upon said premises used by him as aforesaid" certain blinds. The evidence was that the blinds were on the outside of the windows of the room. *Held*, that there was no variance.

On a complaint, under the St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, for maintaining blinds on premises licensed for the sale of spirituous and intoxicating liquors, the jury are authorized to find that blinds on the outside of a room, so placed that a person can look into the room only by stooping down and peering through the slats of the blinds, do interfere with a view of the business carried on in the room.

THE FIRST CASE was a complaint to the District Court of East Norfolk, alleging that the defendant, on May 19, 1881, at Quincy, being then and there licensed according to law to sell spirituous and intoxicating liquors, in two certain rooms, to wit, one rear room on the ground floor, and one room on the second

floor directly above said first-mentioned room, in a certain building, which said rooms were then and there used by the defendant for the sale of spirituous and intoxicating liquors, under the provisions of his said license, "unlawfully did place and maintain, and authorize and permit to be placed and maintained, upon said premises used by him as aforesaid, certain blinds, and ground glass in the door, and curtains and partitions, so that said blinds, ground glass in the door, curtains and partitions, then and there interfered with a view of said business, conducted upon his said premises under the license aforesaid by him," &c.

In the District Court, the defendant, before trial, moved to quash the complaint, assigning the following reasons therefor :

"1. Because said complaint sets out no offence under the laws of this Commonwealth in apt and proper words. 2. Because in said complaint it is averred and set out that said defendant has been and is duly licensed to sell spirituous and intoxicating liquors, in, on and upon the premises described in said complaint; and there is in said complaint no averment that he has in any way violated the terms and conditions of his said license. 3. Because it is nowhere averred in said complaint that said defendant has sold, or offered for sale, any spirituous or intoxicating liquors in violation of any law of this Commonwealth. 4. Because said complaint is inconsistent, contradictory and uncertain, in that it is averred, set forth and alleged in said complaint that the said defendant used the premises therein described 'for the sale of spirituous and intoxicating liquors under the provisions of his said license,' and thereafter sets out certain acts, which, if they are unlawful, are unlawful only because they are inconsistent with, and in violation of the provisions of, the license. 5. Because no crime or offence against the laws of the Commonwealth is described, set forth or contained in said complaint."

This motion was overruled; the defendant was tried, and found guilty; and appealed to the Superior Court.

In that court, the defendant, before the jury were empanelled, renewed his motion to quash, and the motion was overruled by *Gardner, J.* The defendant was then tried and found guilty; and a bill of exceptions was allowed, which, after stating the facts above set forth, proceeded, in substance, as follows :

A witness for the government testified that the lower back room had a bar and beer-pump; that he was there on May 16, 1881; that the defendant and his bar-tender were in this room; that persons were in there drinking, calling for lager beer; that on the day set forth in the complaint he visited the defendant's place of business in Quincy; that it was a rear room on the ground floor; that there was a door leading into it from a private yard, and the panels of the door were of ground glass, through which no one could see; that there were two windows opening into the room, one on the side and the other on the rear; that there were on the outside of the building, attached to the window frames, slat blinds that were closed so that he could not see in; that he stood at a distance of six to ten feet away from the windows, and could not see into the room; that when he went there it was in the evening, and he saw that the room was lighted; that he heard people in the bar-room, but did not see any one in the room, nor any one going in or coming out; that the room was connected by doors with another front room; and that he heard voices of persons in the building, which he believed to be in the bar-room described in the complaint. It was admitted that the defendant held a first-class license, authorizing him to sell spirituous and intoxicating liquors on the premises described in the complaint, but that he used only the lower room. On this testimony, the defendant asked the judge to instruct the jury to render a verdict for the defendant. The judge declined so to rule; and the defendant excepted.

The defendant introduced evidence tending to show that the blinds were old-fashioned slat blinds, with a wide space between the slats, so that any one standing within two or three feet of the windows could readily look between the slats and see the persons in the room, and all that was being done in there. Some of defendant's witnesses testified that they stooped in order to get a view of the room. At the conclusion of the testimony, the defendant asked the judge to rule that, upon the whole evidence in the case, the government had not sustained the averment in the complaint; and that the defendant was entitled to a verdict. The judge declined so to rule.

The defendant then asked the judge to instruct the jury as follows: "1. There is no evidence that the defendant was carrying

on business on the premises described in the complaint. 2. There is a variance between the complaint and the evidence, in that the blinds were not in the room described in the complaint and the license, but were on the outside of the building. 3. If one, by approaching nearly to the defendant's windows, could see what was going on in the licensed premises, notwithstanding the blinds were closed, then the closing of the blinds would not, as matter of law, interfere with a view of the business carried on upon the premises licensed. 4. The government must prove beyond a reasonable doubt that the business of selling intoxicating and spirituous liquors was being carried on at the time, to wit, the evening of May 19th, set out in the complaint, and stated by the government witnesses, and this is not to be presumed from the fact that the defendant had received a license to sell spirituous and intoxicating liquors. 5. In order to convict the defendant, the government must prove that the closing of the blinds prevented a view; that is, prevented one by reasonably approaching the windows from seeing the business carried on in the licensed room."

The judge declined to give the first instruction requested, but left the question to the jury under instructions not objected to; refused to give the second; declined to give the third, but left it to the jury to determine whether the blinds interfered with a view of the business conducted upon the premises; gave the fourth, and added, "the jury must be satisfied that the defendant was carrying on the business described in the complaint, that is, using the premises for the sale of intoxicating liquors," to which no objection was made by the defendant; and also gave the fifth, and added, "but if this could only be done by stooping down and peering through the slats of the blinds, the jury would be warranted in finding that the blinds did interfere with a view of the premises;" and the defendant excepted.

THE SECOND CASE was a complaint to the District Court of East Norfolk, alleging that the defendant, on June 25, 1881, at Quincy, being licensed to sell spirituous and intoxicating liquors in certain rooms of a building described, which rooms were used by him for the sale of such liquors under the provisions of his license, "unlawfully did place and maintain, and authorize and

permit to be placed and maintained, upon said premises used by him as aforesaid, certain shutters, so that said shutters then and there interfered with a view of said business, conducted then and there upon the said premises used by him as aforesaid, under the license aforesaid," &c.

In the District Court, the defendant moved to quash the complaint, assigning the same reasons as those set forth in the first case. This motion was overruled; the defendant was tried and found guilty; and appealed to the Superior Court.

In that court, the defendant, before the jury were empanelled, renewed his motion to quash, which was overruled by *Gardner, J.* The defendant was then tried, and found guilty, and a bill of exceptions was allowed, which, after stating the facts above set forth, proceeded, in substance, as follows:

It was admitted that the defendant had received a first-class license to sell spirituous and intoxicating liquors on the premises described in the complaint.

The government called two witnesses, one of whom testified that he had been in the defendant's bar-room in the forenoon of May 25, 1881; that there was a bar there, and that persons were drinking lager beer. These witnesses testified that on the evening of the day named in the complaint, it being on Saturday, between ten and eleven o'clock, they drove by the defendant's place, both of them being in the same vehicle, twice or three times, the first time twenty minutes before the second time; that the windows opening from the licensed room were closed by wooden shutters nearly close, having only slight cracks between the boards, caused apparently by the shrinking, but that they could not see into the room; that there were windows in the top of the door, but so high up that persons could not see into the room through them; that they saw light in the room, and some persons on the street near the building and coming out of the door; and, at one time, they saw a man coming out of the door; that the shutters were put on the outside of the building, and were so tight as to prevent them from seeing through into the interior of the room. This was the only testimony introduced by the government.

At the conclusion of this testimony, the defendant asked the judge to instruct the jury that there was no evidence to convict

the defendant under this complaint. The judge declined so to rule; and the defendant excepted.

The defendant introduced evidence tending to prove that, on the Saturday night named in the complaint, the shutters were put up at the close of the business for the day; that the defendant went out of the door for the purpose of putting up the shutters some time between ten and eleven o'clock; and that, after they were put up, no business of any kind was done, and no person allowed to be in the place until the following Monday. The defendant was called as a witness, and, on cross-examination, testified that, on the day and evening of the day named in the complaint, he was occupying this place for selling spirituous and intoxicating liquors; that he kept open as late as ten to eleven or half-past eleven o'clock at night; and that Saturday was his best night.

The defendant, at the conclusion of the whole evidence, renewed his request for a ruling, that the government had failed to introduce any evidence that, at the time testified to by the government witnesses, the defendant was doing any business on the licensed premises; and that the jury should render a verdict of not guilty.

The judge declined so to rule as a matter of law, but submitted it to the jury under instructions not objected to; and the defendant excepted.

The defendant asked the judge to rule that there was no evidence that the defendant was carrying on business on the premises described in the complaint, and as therein set out; and that there was a variance between the complaint and the evidence, in that the shutters were not in the room described in the complaint and the license, but were on the outside of the building. The judge declined so to rule; and the defendant excepted.

The two cases were argued together.

E. Avery, for the defendants.

G. Marston, Attorney General, (*C. H. Barrows*, Assistant Attorney General, with him,) for the Commonwealth.

W. ALLEN, J. 1. The St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, provides that "No such licensed person shall place or maintain, or authorize or permit to be placed or maintained, upon any premises used by him for the sale of

spirituous or intoxicating liquors under the provisions of his license, any screen, blind, shutter, curtain, partition, or painted, ground, or stained glass window, or any other obstruction, which shall interfere with a view of the business conducted upon the premises," and § 6 of c. 239 of the St. of 1880 prescribes the penalty for any violation of the provisions of the act. The statute does not make the license subject to the condition that the person licensed shall not do the prohibited acts, but provides that any licensed person doing the acts shall be subject to the penalty. It creates a new offence, which is sufficiently set forth in each of the complaints.

2. Each of the cases was properly left to the jury, upon sufficient evidence, and under instructions sufficiently favorable to the defendant.

Exceptions overruled.

WARREN T. BUSH & another *vs.* WILLIAM A. MOORE
& others.

Worcester. Oct. 6, 1881. — July 3, 1882. LORD, W. ALLEN & C. ALLEN,
JJ., absent.

A guardian, who had misappropriated money belonging to his ward, being insolvent, within six months before the filing of a petition in insolvency against him, and with a view to give a preference to his ward, deposited his own money in a savings bank in his name as guardian of the ward. *Held*, that his assignee in insolvency could maintain a bill in equity to recover the amount so deposited, although the ward was ignorant of the misappropriation and of the fact of the guardian's insolvency.

DEVENS, J. The defendant William A. Moore, being the guardian of his minor son, William A. Moore, Jr., wrongfully appropriated to his own use the funds of his ward; but within six months preceding his petition in insolvency, being then insolvent and intending to restore the funds he had thus wrongfully appropriated, deposited in the defendant savings banks the sum of \$1500 derived from his private property, in his own name as guardian of William A. Moore, Jr., this sum being equal to the amount of these funds with interest. This money the plaintiffs, who are the assignees in insolvency of William A. Moore,

seek by this bill in equity to recover as a preference, said Moore at the time knowing that he was insolvent and acting in contemplation of insolvency. There was no evidence that William A. Moore, Jr. knew anything of this misappropriation of his funds, or in relation to the insolvency of his father.

The plaintiffs rely on the Gen. Sts. c. 118, § 89, which, abbreviated, is as follows: "If any person, being insolvent or in contemplation of insolvency, with a view to give a preference to any creditor or person having a claim against him, makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment or to be benefited thereby, having reasonable cause to believe such person is insolvent, the same shall be void; and the assignees may recover the property, or the value of it, from the person so receiving it or so to be benefited."

That preferences or transactions which may operate as such, or to protect or secure one who has a claim against the estate of an insolvent, are lawful, except so far as they are in violation of the provisions of the insolvent law, will not be controverted.

It is contended that the ward was not a creditor of the guardian or a person having a claim against him; and that the transaction therefore, by which the guardian sought to relieve himself from civil responsibility at least for his wrongful act in misappropriating the funds of the ward's estate by restoring them to the estate, could not constitute a preference which would be voidable by reason of the insolvency. Had the ward come of age, and had this misappropriation of funds continued, it is argued, there would have been no claim by the ward which could have been the foundation of an action. His remedy would have been to summon the guardian into the Probate Court to settle his accounts, and, upon this settlement, to have it determined what balance was due, and whether the ward's property had been misappropriated. If, upon the adjudication of the Probate Court, a balance appeared to be due from the guardian, or if he failed to account, there would then have been a remedy which would be the only one afforded by law or equity for failure to account, or for failure to comply with the decree of the Probate Court.

Brooks v. Brooks, 11 Cush. 18. *Moore v. Hazelton*, 9 Allen, 102. *Simmons v. Almy*, 100 Mass. 239.

The title to the property of one under guardianship continues always in the ward; the guardian has its custody merely; if, availing himself of that custody, he wrongfully uses it, there is a just claim on the part of the ward that the integrity of the fund shall be restored. It is not important in what form the ward is compelled to seek his remedy, or that the wrongful act of the guardian will not immediately afford a ground of action against him. Even if, upon a settlement in the Probate Court, it might have been held that the lawful and proper charges of the guardian would exceed the amount of his spoliations, there was not the less a just claim that the ward's property which had been unlawfully dealt with should be replaced.

But, even if there were a claim on behalf of the ward, which could be the subject of a preference, it is contended that the transaction under discussion cannot be invalidated; that the statute of insolvency contemplates that there shall be two persons acting in violation of its provisions, in order that an attempted preference shall be unlawful: one, the person insolvent, or in contemplation of insolvency, seeking to give the preference; the other, the person receiving the same or to be benefited thereby, having reasonable cause to believe that the person making the same is insolvent or in contemplation of insolvency. But, where the same person acts as the giver and receiver of the security, the concurrence and participation of two parties to the fraudulent preference exists. That the insolvent intended this preference is clear; it is he also who in his capacity of guardian received it, and the ward must be bound by his knowledge. Had the guardian received the money in question from a third person who owed the ward, the reasonable cause to believe such third person insolvent, possessed by him, would affect the ward; such knowledge would not the less affect the ward because instead of a third person the guardian was himself the debtor. The ward was the victim of the original spoliation of his estate; for this he has an appropriate remedy, which should be sufficient, upon the guardianship bond. He had no part in the attempt of the guardian to purge his fraud, and no reasonable cause to believe the guardian insolvent is shown on his part; but the money

transferred to him was not the less transferred by one in contemplation of insolvency and received by one who had such reasonable cause. One individual acting in two capacities, as debtor and on behalf of the creditor, may constitute the two persons contemplated by the statute. *Decree accordingly.*

W. S. B. Hopkins, for the plaintiffs.

F. P. Goulding & F. H. Dewey, Jr., for the defendants.

CHARLES A. REED vs. NICHOLAS N. CRAPO.

Bristol. October 26, 1880; May 6. — July 3, 1882.

If a waiver, by all persons interested in land sold by a collector of taxes, of an informality in the sale, after the bringing of a writ of entry by the purchaser at the sale against a person claiming title to the land as a disseisor, will operate by estoppel to make good the demandant's title as against such persons, it will not have that effect as against the tenant.

DEVENS, J. This is a writ of entry, in which the demandant claims title under a tax collector's deed. The premises in dispute were sold by the collector of the city of Taunton, for taxes assessed against the heirs of Elizabeth Angell, as the property of non-resident owners. The tenant contended that he had acquired title by adverse possession. But, under instructions on this point not objected to, the jury found for the demandant. In dealing with the exceptions not disposed of by the verdict, the tenant is therefore to be treated as having no title to the land, and as being in possession only as a disseisor.

The tax was assessed to the heirs of Elizabeth Angell under a statute which provides that "the undivided real estate of a deceased person may be assessed to his heirs or devisees without designating any of them by name, until they have given notice to the assessors of the division of the estate and the names of the several heirs or devisees; and each heir or devisee shall be liable for the whole of such tax, and when paid by him he may recover of the other heirs or devisees their respective proportions thereof." Gen. Sts. c. 11, § 10.

When the assessment was made, some of the heirs were in fact residents of Taunton, and it was admitted that no demand was made upon them or upon any occupant of the estate. Gen. Sts. c. 12, § 22. The collector, supposing the heirs to be all non-residents, proceeded according to the requirements in such cases. His deed to the demandant recites that "said heirs were and are non-residents, and have appointed no inhabitant of Taunton as their attorney for the payment of said taxes." Gen. Sts. c. 12, § 25. It further appeared thereby, that notice of the time and place of sale had been given only by an advertisement duly published and posted. Gen. Sts. c. 12, § 28.

At the first trial, the attempt was made to obviate the objection to the validity of the deed arising from the circumstance that some (and the larger part) of the owners of the land were in fact residents, by showing that most of them had received their shares of the surplus, after the collector had applied the proceeds of the sale to the payment of the tax, and had discharged him from any liability on account thereof. The sale and conveyance by the collector of lands sold for the payment of taxes is the exercise of a mere statutory power, and to be effectual it must in all respects conform to the requirements of the statutes. If compliance with these could be waived, it could only be by the concurrence of all interested in the estate. Even if the receipt of the money might possibly estop the receivers from contending that the sale was invalid by reason of the failure to demand the tax from them, or for any similar reason, and might thus be deemed a waiver of their rights in that regard, and a ratification of the sale, yet the deed could not operate to convey a title even by estoppel, unless all entitled to object to the invalidity of the proceedings of the collector had waived their right so to do. *Reed v. Crapo*, 127 Mass. 39.

As the case then stood, the deed was therefore inoperative to give the demandant a title, and the tenant, even if he is but a disseisor in possession, has a right to occupy until a better title is shown. *Wellington v. Gale*, 13 Mass. 483.

It now appears that, since the first trial, the remaining owners have been paid their share of the surplus, and have in distinct terms ratified and confirmed the sale made by the collector. All persons having any title to the land have now given to the

collector receipts for their shares of the surplus, together with releases under seal from any liability on account of the sale.

Upon these facts, the demandant contends that, all the real owners of the estate having waived the demand upon them and ratified the deed of the collector, the tenant is bound by this waiver and ratification, upon the ground that one in possession, sustaining it by no other title than a denial that a former owner had parted with his rights, is so far privy in estate to him whose title he maintains that he is concluded by whatever destroys that. *Somes v. Skinner*, 3 Pick. 52, 60. *Russ v. Alpaugh*, 118 Mass. 369, 376. *Kinsman v. Loomis*, 11 Ohio, 475.

But, in a real action, judgment must be rendered upon the title as it stood at the date of the writ. *Andrews v. Hooper*, 13 Mass. 472. *Hall v. Bell*, 6 Met. 431. *Hooper v. Bridgewater*, 102 Mass. 512. It is the right of the tenant here, that all the conditions made necessary by law to vest the title in the demandant shall have been complied with when action is brought. He is not to be subjected to the expense of litigation by reason of a title which the demandant may subsequently acquire. If, under the circumstances of the present case, the acts of waiver and estoppel here relied on can be held by relation to establish the title of the demandant, as against the record owners, from the date of the collector's deed, still such waiver by the owners since the commencement of the action cannot be held to make the demandant's title good as against the tenant's right of possession at that time.

The court having refused to rule at the trial that no waiver by the owners since action brought could affect the tenant, or give the demandant a right to recover, the entry must be

Exceptions sustained.

The case was argued at the bar in October 1880, and was afterwards submitted on briefs to all the judges.

W. H. Fox, for the tenant.

C. A. Reed, pro se.

OTIS F. PUTNAM *vs.* JOHN R. LANGLEY & others.

Essex. November 1, 1881; May 6. — July 3, 1882.

The election of a water commissioner of a town was required by statute to be by ballot, and at the annual town meeting for the election of town officers. The moderator of the meeting at which such officer was to be voted for appointed a committee of five citizens to count the ballots cast, who reported to him, and he announced the vote, and a certain person was declared elected by a majority of one vote. A motion was thereupon made and carried that the votes be recounted by a new committee. The moderator then appointed a new committee, who recounted the votes and reported that another person was elected by a majority of one vote, and the moderator so declared the vote, stating that it so appeared by the recount. No objection was made to this declaration. The ballots were not preserved, and it did not appear where the ballot-box was during the time that elapsed between the first declaration and the recount. *Held*, on a petition for a writ of mandamus by the person declared to be elected on the recount, that he was entitled to the office; and that mandamus was the proper remedy.

PETITION for a writ of mandamus, to compel the respondents John R. Langley and Daniel Richards, as water commissioners of the town of Danvers, to recognize, receive and act with the petitioner as a member of said board, and to compel the respondent Josiah Ross to refrain from acting as such member. Hearing before *Endicott, J.*, who ordered the petition to be dismissed; and, at the request of both parties, reported the case for the determination of the full court, such judgment to be entered as law and justice might require. The facts appear in the opinion.

The case was argued at the bar in November 1881, and was afterwards submitted on briefs to all the judges.

D. N. Crowley & T. M. Osborne, for the petitioner.

J. A. Gillis, for the respondents.

DEVENS, J. The election of water commissioners was required to be by ballot, and at the annual town meeting of the town of Danvers for the election of town officers. St. 1874, c. 191. The moderator of the meeting at which such officer was to be voted for appointed a committee of five citizens to count the ballots cast, who made report to him, and he announced the vote, and Josiah Ross was declared elected by a majority of one vote. A motion was thereupon made that the votes be recounted by a new committee, which was carried. The moderator then

appointed a new committee, who recounted the votes, made report that the petitioner was elected by a majority of one vote, and the moderator so declared the vote, stating that it so appeared by the recount. These facts appear by the record. To this declaration no objection appears to have been made. As the ballots were not preserved and produced, and as there was no evidence where the ballot-box was during the time that elapsed between the first declaration and the recount, the recount cannot be said to be conclusively shown to have been correct, and unless, in connection with the fact that the declaration of it was unquestioned, it is in law so to be deemed, this petition cannot be maintained.

No provision is made by statute as to the mode in which, or the persons by whom, the result of such an election shall be ascertained. This must necessarily be done by the meeting itself, and, from its character and the numbers who compose it, must primarily be effected by a count of the votes by the moderator or other officers, or by a committee appointed by the meeting, or by its officers with its assent. Such committee is an instrument of the meeting, and not a distinct counting or canvassing board. No special force can be given to the declaration of the moderator, after such a committee reports the result of the count to him, that an officer is elected. It can amount to no more than a statement by him that the officer appears by such count to be elected. As the meeting is charged with the duty of making an election by a ballot, if a majority of its members desire further examination of the correctness of the result reached by the committee, it must be its right to subject such result to further scrutiny. If the result announced is assented to directly, or perhaps indirectly by proceeding with other business, and an examination of the subject is thus closed, there would be much force in the argument that the election would be fully completed; and that, as an officer once lawfully elected by ballot cannot be arbitrarily deposed, further action by the meeting would be as ineffectual as the action of a subsequent meeting. But when, the committee having made its announcement through the moderator, a motion is "thereupon" (which must mean without delay or lapse of time) made and carried that the votes shall be recounted, and, such recount being made and announced, it is either formally

accepted or no objection is made thereto, it must be regarded as the decision of the body entitled to determine the matter. No earlier opportunity existed to object to the count or suggest possible error in it. The power thus to recount the ballots is not like the power to reconsider a vote passed by the town in the management of its municipal affairs, but is simply an ascertainment and verification of that which has been done.

It is said, if this is so, committee may succeed committee indefinitely in counting and recounting the ballots, and the final count will be arbitrarily permitted to stand to the exclusion of all that have preceded it, while it is equally subject to error. But if the final count commands the assent of the meeting as correct, there is every reason why this should be so, unless at least it can be shown to have been clearly wrong. Whether, if this could be proved, the final count could be set aside, need not be discussed, as there is no such proof. Until the meeting accepted the result of the count, negatively at least, by failure to make any further suggestion or objection, the ballots should have been in the hands of the committee, or of the moderator, to whom it might have returned them with its report. It cannot be inferred that they were not in proper custody when the recount was ordered.

While the precise question under discussion has not been passed upon, the great importance which is attributed to the action of towns and other public bodies entrusted with the duty of electing officers is shown by the cases of *Attorney General v. Simonds*, 111 Mass. 256, 259, *Baker v. Cushman*, 127 Mass. 105, and *State v. Foster*, 2 Halst. 101.

A majority of the court is therefore of opinion that the petitioner is entitled to the office of water commissioner which he seeks.

There only remains the inquiry whether his remedy is by writ of mandamus, and this appears to be clearly settled. *Strong, petitioner*, 20 Pick. 484. *Conlin v. Aldrich*, 98 Mass. 557. *Pearsons v. Ranlett*, 110 Mass. 118, 126.

Peremptory mandamus to issue.

JOB A. TURNER & another vs. NATHAN ROBBINS & another.

Suffolk. Jan. 18, 1880; March 22. — July 1, 1882. FIELD, J., absent.

The St. of 1851, c. 290, reënacted in the Gen. Sts. c. 43, §§ 17, 18, and providing for the apportionment of damages awarded for the taking for a highway of land in which there are distinct or separate interests, is not unconstitutional so far as it affects the parties to a lease made after its passage; such parties must be deemed to have taken their title subject to these provisions; and if gross damages have been paid to a trustee appointed by the judge of probate, under said statutes, the lessee, or those claiming under him, cannot maintain a bill in equity against such trustee and the general owner of the land, to compel a different distribution of the damages from that provided for in the statutes, even if the appointment of the trustee was irregular or invalid.

C. ALLEN, J. This is a bill in equity by persons representing the interests of tenants under a lease of land, with a building thereon, part of which was taken by the city of Boston for a highway. The plaintiffs seek to recover what they consider to be their just share of the damages awarded and paid by the city for such taking, and now in the hands of a trustee appointed under the Gen. Sts. c. 43, § 18. The trustee appointed by the Probate Court and the general owner of the land are the parties defendant.

The lease was made in December 1854, and was to run from January 1, 1855, to January 1, 1873. Part of the leased land was taken by the city in 1869, while Turner and Snow, and certain of their tenants at will, were in possession. An award of \$8889, as damages, was made by the aldermen in the same year, which award was not appealed from. The general owner of the land petitioned the Probate Court for the appointment of a trustee to receive and hold the damages, under the Gen. Sts. c. 43, § 18, and the defendant Robbins was appointed as such trustee in 1871, and he brought suit against the city and recovered judgment, and was paid, in June 1872, the sum of \$10,208.75 for the damages and interest; and afterwards the city brought a writ of review, seeking to reverse said judgment, and the case was twice before this court, and the writ of review was finally dismissed, in 1879. See *Boston v. Robbins*, 121 Mass. 453, and 126 Mass. 384.

The principal grounds relied on by the plaintiffs, briefly stated, are as follows: 1. That they sustained special and peculiar

damages by the taking, and that the aldermen who made the award recognized this fact, and included such special damages as an element in making up their award of \$8889. 2. That Robbins was not duly appointed trustee, and especially that his bond was not approved by the judge of probate. 3. That if the true construction of the Gen. Sts. c. 43, § 17, limits the right of the plaintiffs to the annual income of the sum awarded and paid as damages, then that section is unconstitutional. The defendants demur to the bill for general want of equity.

We have considered all the grounds taken in argument on the part of the plaintiffs, and are of opinion that the plaintiffs are not entitled to prevail on any of them.

By the St. of 1851, c. 290, which was in force at the time when the lease in question was made, it was provided that, in cases like the present, entire damages should be assessed, without any apportionment thereof; and that the amount should be paid over to a trustee to be chosen by the parties, and held in trust for them, the annual income to be paid to the tenant for years, and the remainder to the reversioner; and in case of a failure to choose such trustee, the judge of probate should appoint one, for the same purposes, who should give bond to the judge of probate for the faithful performance of his duties. This statute altered the law as then existing, which made a different provision for the apportionment of the damages. Rev. Sts. c. 24, § 12. The St. of 1851, c. 290, was reenacted in substance in the Gen. Sts. c. 43, §§ 17, 18, and continues in force to the present time. Pub. Sts. c. 49, §§ 18, 19. The lease was made in view of the provisions of law which were in force at the time of its execution, and a majority of the court is of opinion that the lessees must be deemed to have taken their title subject to those provisions. It has heretofore been held that owners of land cannot, by their contracts, cut off the right of the public to take the land by eminent domain, or increase the amount of damages which the public can be compelled to pay for such taking. *Edmonds v. Boston*, 108 Mass. 535, 544, 549. *Burt v. Merchants' Ins. Co.* 115 Mass. 1. It need not be considered here how this legislation would affect the rights of lessees holding under a lease executed prior to the enactment of the St. of 1851. The lessees under this lease must be deemed to have

assented to the distribution of damages provided for in the statutes; at least, so far as concerns their relation to a trustee appointed under those statutes. It is not suggested that the lease contained any provisions to the contrary; and, if it did, the conclusion by no means follows that the lessees would thereby stand in any different relation to the trustee.

If the aldermen included in their award special damages for the lessees, with a view of changing the distribution of the gross sum from the method provided by statute, their intention would be ineffectual. The statute provided that entire damages should be assessed, and the means adopted or elements considered by the aldermen in arriving at their result must now be disregarded. Their award was not appealed from. It stands, therefore, as an award of a gross sum, and is to be distributed according to the statute. With any other method of distribution, the trustee has nothing to do.

If the appointment of the trustee was irregular and invalid, it is not apparent how this fact can give to the plaintiffs a right to any greater portion of the money in his hands. A new trustee appointed in his place would hold subject to the same provisions of statute. By the St. of 1873, c. 253, § 1, the present trustee, if his appointment is invalid, is held to account in the same manner as if his appointment were regular and valid.

No demand has been made upon the trustee to pay to the plaintiffs the sum which they are entitled to receive under the statute. He has never refused to make such payment. The entry therefore must be

Demurrer sustained.

The case was argued at the bar in March 1880, by *A. A. Ranney*, for the plaintiffs, and by *J. O. Teele*, (*C. R. Train* with him,) for the defendants; and was réargued in March 1882, by *J. H. Benton, Jr.*, for the plaintiffs, and by *Teele*, for the defendants.

PAUL N. RANDALL *vs.* WILLIAM H. CHASE.

Middlesex. May 6. — July 3, 1882.

- A. conveyed to B., his heirs and assigns, "a privilege of passing and repassing with carriages or otherwise, as the said B. may elect, in the driveway by the westerly end and southerly side" of a certain block of buildings, "to land of B., said driveway to be kept not less than twelve feet wide." *Held*, that the right of way was definitely located twelve feet in width adjoining the buildings, and was not merely personal to B., but was an easement which B. could convey.
- A. conveyed to B. a right of way, describing it as a driveway by the westerly end and southerly side of a block of buildings to land of B. The land of B. was afterwards conveyed to C., by a deed describing the way as on the westerly end and southerly side of said tract of land. In an action by C. against a grantee of A.'s land for obstructing the way, in which the precise location of the way was in dispute, it was *held*, that C. was entitled to put in evidence the deed from A. to B.
- In an action of tort for obstructing a right of way, the location of the way was in dispute, the plaintiff contending that it adjoined a certain block of buildings. The plaintiff put in evidence a deed, describing the way according to the plaintiff's contention. This deed was made more than thirty years before, and the person who then owned the plaintiff's estate was a party to it. He also subsequently owned the defendant's estate. *Held*, that the defendant had no ground of exception to its admission.
- In an action of tort for obstructing a driveway which the plaintiff claimed over the defendant's land, the location of the way was in dispute. The defendant's deed described one of his boundary lines as running from the county road about thirty-eight feet to the centre of a driveway. *Held*, that the establishment of the line of the county road had some tendency to show where the driveway was; and that, for this purpose, it was competent to show the line of occupation of the county road by fences or projections of buildings. *Held, also*, that a photograph of these structures was admissible in evidence, to assist the jury in understanding the case, if verified by proof that it was a true representation.
- Where the defendant, in an action against him for obstructing a right of way, contends that he has acquired such right by adverse possession, evidence is inadmissible that the way has been similarly obstructed by other persons in places over which the plaintiff did not have occasion to pass in reaching the highway.
- The rule that a deed of a dissee conveys no title which can be enforced in the name of the grantee, against the disseisor or his privies, has no application to a conveyance of an incorporeal hereditament such as a right of way.
- No exception lies to the refusal to give an instruction in the language requested, if it is given in substance.

TORT for obstructing the plaintiff's right of way over the defendant's land in Hudson. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

R. Lund & H. F. Hurlburt, for the defendant.

G. A. King & J. T. Joslin, for the plaintiff.

DEVENS, J. 1. The plaintiff claimed a right of way over the defendant's premises, which way he alleged to have been obstructed. This right was asserted to exist both by express grant and by prescription. The way was claimed to be located immediately south of the defendant's building, and to be twelve feet in width. The plaintiff's title came by mesne conveyances from Reuben Hapgood, who, on March 6, 1836, conveyed the premises to Francis Brigham. While Brigham owned the premises, on May 1, 1837, Albert Randall, who then owned the defendant's premises, conveyed to him, his heirs and assigns, what the deed describes as "a privilege at all times of passing and repassing with carriages or otherwise, as the said Francis may elect, without any hindrance or obstruction, in the driveway by the westerly end and southerly side of the block of buildings in which said tenement is situated, to land of said Francis, said driveway to be kept not less than twelve feet wide." This was not, as the defendant contends, a mere personal privilege, but an easement which Brigham could convey; nor was it a grant of a way such as Brigham might elect, but of a way defined by the westerly end and southerly side of the block, and by its width. The election given to Brigham related merely to his mode of using the way, whether "with carriages or otherwise."

Brigham conveyed to Houghton, the plaintiff's intermediate grantor, on November 27, 1845, describing the tract of land by metes and bounds, and the privilege as in "the driveway by the westerly end and southerly side of said tract of land, said driveway to be kept not less than twelve feet wide." When the location of the way was disputed, at the trial, it was proper for a more minute description to refer to the deed under which Brigham obtained a privilege in a way which was alike described as on the southerly side of the block and of the tract on which the block stood. The deed of Randall to Brigham of May 1, 1837, was therefore admissible in evidence.

2. The title of the defendant was derived from Albert Randall, who, after the conveyance of the right of way to Francis Brigham, heretofore stated, conveyed, on December 1, 1837, a tract of land including the premises of the defendant to Luke

Gates, reserving the privilege of the use of a driveway on the east side of said lot, "for the use of the owners or those that may own the tenements in the block adjoining." This tract was conveyed to Francis Conant on July 1, 1838, and by Conant conveyed to Francis Brigham on March 22, 1849, who on January 30, 1860, conveyed the tract in two parcels to Clark and Maynard respectively, the parcel conveyed to Clark being that now owned by the defendant. Each of these parcels is bounded to and by the centre of the driveway, alleged to be obstructed, and is conveyed subject to the right of other owners of the block to pass and repass thereon.

On March 30, 1839, Stephen Pope and others conveyed to each other and to Albert Randall a right of way in a passage or driveway on the southerly side of the block, commencing at the westerly end thereof and terminating at its easterly end, "said passage or driveway to be not less than twelve feet wide and adjoining said block of buildings." The object of this deed was manifestly to give to all the tenants in the block a right of way similar to that obtained by Brigham from Randall. The plaintiff was permitted to give this deed in evidence, as tending to establish by its recitals the location of the driveway, which was the matter disputed at the trial. At the time it was made, it will be observed by the dates heretofore given, Randall, although a grantee, had ceased to be an owner of the tract which included the defendant's premises, and Conant, who then held this tract, was not a party to it. As no one having any interest in the defendant's estate joined in it, the defendant, at the trial, objected to its admission in evidence, on the ground that it could not affect the defendant's estate either to create or locate a passageway. But Francis Brigham, to whom Conant afterwards conveyed and under whom the defendant now claims, then owned the plaintiff's estate, and was a party to it both as grantor and grantee. When he afterwards granted the defendant's estate, bounding it to "the centre of a driveway south of the block," and recognizing the right of the other owners of the block to pass over the way, the claim made by him, when holding the plaintiff's estate, as to the location of the way over the defendant's estate, is admissible as against his grantee, as tending to show that the way described was one "adjoining the block of

buildings." Even if neither claimed under it or the parties to it, this deed was also admissible upon the ground that, having been made more than thirty years, its recitals were competent evidence of the place where the way was located, upon the same principle upon which it has been held that recitals in ancient deeds are evidence upon a question of boundary to prove the position of a line from which the disputed bound can be determined. *Morris v. Callanan*, 105 Mass. 129. Nor was the use made of it in the charge of the presiding judge improper, the jury being instructed that, if the way was never practically located otherwise than in the manner and by the continued acts which he described, its situation might be presumed and taken to be, according to the terms of this deed and that of Randall to Brigham in 1837, that of a driveway not less than twelve feet adjoining the block.

3. As the northern boundary of the defendant's estate was on the southerly side of the county road, and as his line ran from that road "about thirty-eight feet south to the centre of the driveway south of the block," if the southerly side of the county road were established, it had some tendency to show where the driveway was. For this purpose it was competent to show where the line of occupation had been for many years, as indicated by the fences, piazzas, or other projections of buildings. Gen. Sts. c. 46, § 1. Nor, if in the opinion of the presiding judge it was sufficiently verified, was it incompetent to use a photographic sketch of the premises to aid the jury in understanding the relation in which these structures stood to the road. *Blair v. Pelham*, 118 Mass. 420.

4. The evidence offered by the defendant, that the parties owning tenements east of the defendant's lot had made erections in the rear of and adjoining the south wall of the block, and extending about the same distance therefrom as the obstruction alleged, and that a team could not there be driven within five feet of such wall, was rightly refused. It tended to show an invasion or occupation of the way in another part than that which was in controversy, and over which the plaintiff did not pass in reaching the highway. It had no legitimate bearing on the inquiry whether there had been on the defendant's land such an adverse possession of the way, even if originally granted,

adjoining the building, as would compel the defendant to accept one farther south.

5. The defendant requested a ruling that the plaintiff was not entitled to recover if the defendant's obstructions were on the passageway, substantially as they existed when the action was brought, at the time he took his deed, and this upon the ground that the grantor was thus disseised at the time of his deed. But neither the rule that a party disseised of real estate cannot, except as against himself, convey title thereto, nor the principle of the feudal law on which it is founded, has any application to an easement which is an incorporeal hereditament, of which there can be no seisin. It is a liberty, privilege or advantage, which one man has in the lands of another, and belongs to that class of rights which are said to lie in grant, and not in livery, for, existing only in idea, in contemplation of law they cannot be transferred by livery of possession.

6. There was testimony from Houghton, as well as other witnesses, which tended to show that while he held the plaintiff's estate, even if entitled to a way adjoining the block of buildings, one was accepted, adopted and used eight feet farther south, agreed to by all persons interested, and used by them without objection as the passageway, for more than twenty years before the bringing of the suit. Upon this evidence, the defendant requested the third, fourth and fifth instructions, which were, in substance, that if, while Houghton owned the plaintiff's land and Brigham owned that of the defendant, they, with the consent of all the other owners of rights in the passage, agreed upon, located and worked a passageway across Brigham's lot, that established the location thereof so far as Houghton as well as his subsequent grantees were concerned, and that, if the passage was thus located when the defendant bought, he might rely on it.

We do not perceive that these instructions were not given so far as the defendant was entitled to them. The plaintiff had bought his estate in 1858, and the grant of the way by Randall had been made in 1837. The instructions submitted to the jury the inquiry where this way was practically located by the consent of the parties, and whether, as thus located, it afforded the plaintiff a way south of, and not obstructed by, any of the

buildings which the plaintiff in this action alleged to be erected and maintained in violation of his right in the driveway. They permitted the jury to treat any way, located south of the block, twelve feet in width, which had been maintained, acquiesced in, and used by the parties themselves, or those under whom they claimed, as the driveway to which the case related, and to inquire whether that had been so obstructed by the act of the defendant that the plaintiff did not have a space twelve feet wide for passing and repassing. It was only in case there had been no such practical location that the court held that the situation of the passage must be defined by the deeds of Randall to Brigham, and of Pope and others to Pope and others and Brigham, as adjoining the block.

7. The defendant set up a prescriptive right to maintain the obstructions in the way, and the instruction requested by him was substantially given.

We do not perceive any other exceptions or refusals to instruct according to the defendant's requests which require remark. We have not noticed them in the order of the bill of exceptions, as it seemed less convenient to do so. These requests are numerous, confused and involved, and would sometimes appear rather adapted to embarrass a trial than to elicit a correct result.

Exceptions overruled.

INHABITANTS OF BROOKLINE vs. CHARLES G. MACKINTOSH.

Norfolk. May 6. — July 5, 1882.

The St. of 1872, c. 943, authorized a town to take, hold and convey, for necessary uses, the waters of a river, to a certain amount daily, and for this purpose to take and hold lands, build reservoirs, aqueducts and dams; and provided that it should pay all damages sustained by any person in his property by such taking of water, or of any land, rights of way, water rights or easements, and that the owner of any property taken as aforesaid, or other person "sustaining damages as aforesaid," should recover damages in a mode pointed out. *Held*, that if a person on the river, above the place where the town took water, had acquired the right to foul the stream, there was no taking by the town of such right by implication.

Since the passage of the St. of 1878, c. 183, forbidding the discharge into any river or stream, used as a source of water supply by any city or town, within twenty miles above the point where such supply is taken, of any sewage, drainage,

refuse or polluting matter of such quality or amount as to be deleterious to health, a person cannot acquire by prescription the right so to foul a stream within such distance, as against a city or town using the stream as its source of water supply.

A town, authorized by statute to take water from a river, acquired land on the bank of the river, and took the water by percolation into a filtering gallery. Four thousand feet above its works, A. carried on the business of wool-pulling, and cast daily into the stream, in the process of such business, animal matter in a state of decomposition, together with a small amount of arsenic. The quantity so cast into the river made no perceptible difference in the quality of the water at the point where the town took its supply, and no trace of arsenic could be there discovered by chemical analysis. If the town should take its water directly from the river, there would be a possibility, especially in times of freshets, that some arsenic would be carried into the water used by the town. A.'s factory was not run to its full extent, and the danger from arsenic would be increased by any increase in the use of the factory. A. could not acquire a prescriptive right to pollute the river. *Held*, that the town could not maintain a bill in equity against A. to restrain him by injunction from continuing his business.

BILL IN EQUITY, filed November 23, 1880, for an injunction to restrain the defendant from corrupting and polluting the waters of Charles River, from which the plaintiff takes water for domestic use by its inhabitants. Hearing before *Soule, J.*, who, at the request of the parties, reported the case for the consideration of the full court, in substance as follows:

On May 7, 1872, the plaintiff town accepted the St. of 1872, c. 343, and under the authority given by it, by a vote passed on April 22, 1874, a copy of which was duly recorded in the registry of deeds for Norfolk county within sixty days thereafter, declared its intention to take daily from Charles River one million five hundred thousand gallons of water for the supply of its citizens.

In the exercise of its powers under the act, the plaintiff town, in 1873, purchased certain lands in Boston, bounded on Charles River, and extending to the middle thereof; and, at about the same time, took certain other lands adjoining, and bounded by and extending to the middle of the river, for the general purposes of its water supply, and it has ever since been, and still is, in possession of all said lands, which have a frontage of several thousand feet on Charles River, and contain from twenty to thirty acres.

The town does not now obtain water by pumping or by other means directly from the river, but obtains it, and has always

obtained it, by pumping from an underground trench, or filtering gallery, into which the water flows by percolation through the walls of the gallery, chiefly from the landward side, but in part from the river through the natural wall of gravel and other material between the gallery and the stream. A trench opening directly into the river, and running nearly parallel with the gallery, at an average distance of about thirty feet from it, and at the nearest point fifteen feet from it, aids in bringing a supply of water from the river, by lessening the thickness of the intervening wall or filter between the gallery and the water of the stream.

The town uses about one million two hundred thousand to one million four hundred thousand gallons of water daily in the summer season, and about eight hundred thousand gallons daily in the winter season. The flow of the river at a point about four thousand feet above where the gallery is situated, is from nine million to ten million gallons daily.

There is no purpose on the part of the town at present to obtain a supply of water directly from the river, without the intervention of the earth-filter; but it will probably be necessary for it to enlarge its supply by some means within a short time, perhaps within a year or two.

About six weeks before the bill was filed, the defendant began to carry on the business of wool-pulling in a building situated in Dedham, in the county of Norfolk, on the banks of Charles River, at a point about four thousand feet up stream, by the course of the river, from the trench, filtering gallery and pumping station of the plaintiff. He operates on about two hundred sheep-skins or pelts daily, all of which are soaked in vats under the building, into and from which the water of the river flows freely, for one night, after which each skin is treated with a mixture of lime and red arsenic, which is permitted to remain on it for some hours, after which the skin is washed in the vats, into which the mixture of lime and red arsenic, except such small part of it as has been absorbed by the skin, passes and falls to the bottom of the river. About one and one third pounds of red arsenic is used daily. It is a harmless substance, so far as any effect on the water is concerned, if pure; in fact, it is never absolutely pure, but, as bought and sold in commerce, is always

mixed with a small proportion of white arsenic, which is an active poison. In the prosecution of the work of wool-pulling, more or less animal matter, in a state of partial decomposition, either in a solid form or mixed with fluid, is thrown into the river. The quantity is sufficient to defile the water at the factory where the work is done, and make it unfit for domestic use there, but it is not sufficient to produce any perceptible effect on the quality of the water in the river at or opposite to the point where the plaintiff's works are situated.

No trace of arsenic can be discovered by chemical analysis in the water of the river at or opposite to the plaintiff's works. In times of freshet, when the bed of the river is specially disturbed, it would be possible that small quantities of white arsenic might be carried, suspended in the stream, as far down as the plaintiff's filtering gallery, and even farther.

As the plaintiff now obtains its water by filtration into the gallery from which it is pumped, no damage is done by the defendant to the quality of the water which it uses; and no damage is done to the property of the town, either in the value of the land which it purchased, as distinguished from the value of its waterworks, or in the value of the waterworks.

If the plaintiff should obtain its water for use by pumping directly from the stream, without the intervention of a filter, there would be a possibility, especially in times of freshet, that some poisonous arsenic, put into the water by the defendant, would be carried into the water used by the town, but it would necessarily be in very small quantities, suspended in the water.

According to chemical analysis, the water of the river is now of substantially the same quality as it was ascertained to be before the plaintiff decided to take the water under the St. of 1872.

The sewage of several towns is discharged into the river twenty miles above the defendant's factory, but it did not appear that the water of the river opposite the plaintiff's works is injuriously affected thereby. It would not be certain that, because the chemists failed to detect the presence of sewage or decayed animal matter in the water, it was not in fact there.

The capacity of the defendant's factory is about five times the amount of work now done there. The amount of arsenic used,

and of animal matter cast into the stream, would increase in direct proportion with the increase of work done; and the probability of poisonous arsenic being carried into the water used by the plaintiff, if the supply were obtained by pumping directly from the stream, without the intervention of a filter, would be increased in the same proportion.

In the year 1850, one Joseph H. Billings engaged in the business of wool-pulling at a point on the bank of Charles River directly opposite the defendant's factory, and carried it on there till 1859, in substantially the way in which the defendant now carries it on. On August 29, 1859, Billings bought land where the defendant's factory now stands, and there built the factory in a manner specially adapted to the business of wool-pulling, and then made an arrangement with the defendant under which they carried on that business together, till Billings died, in 1874, after which the defendant continued the business, as surviving partner, till 1875, when his brother hired the factory from the administrator of Billings, and continued the business in person till February 1878, when he left the business in charge of his servants, who finished manufacturing the stock on hand in July 1878, after which no work was done there till the defendant began his business in October 1880. When the defendant's brother left the factory, in February 1878, he went into the employ of another, in the same business, in another town, intending to remain with him but a short time, and expecting at some time to resume business at the factory. In June 1878, he bought the factory and land at an administrator's sale, and received a quitclaim deed of it, which has never been recorded. In the summer of 1878, the windows of the factory were broken by trespassers, who did other damage, and carried away all the movable property about the premises; the brother of the defendant boarded up the doors and windows, and it remained unoccupied till September 1880, before which time it had become ruinous, and unfit for use. At that time, he began to repair it, and let it to the defendant.

The defendant has never had a license from the selectmen of Dedham for any of his proceedings. The business done there creates an offensive odor, which is perceptible at times at a distance of half a mile from the factory.

Before the defendant began business, in November 1880, he was notified by the water board of Brookline, that, if he began to wash sheep-skins in the river, an attempt would be made to obtain an injunction against him.

There was no evidence as to who owned the land which the plaintiff town purchased, between 1859 and the time of the purchase, other than the grantors of the town, if anybody, nor whether such owners were or were not persons *sui juris*, nor whether they or the grantors of the town had actual notice of the carrying on of the business by Billings and the defendant, except so far as such knowledge might be inferred from the character of the business, and the fact that it was carried on openly. The judge found that actual knowledge by the owners of the carrying on of the business was not proved; and reserved the question whether, in this state of evidence, there was a presumption of law that such owners had such knowledge.

Such decree was to be entered as to the full court should seem proper.

M. Williams, Jr. & C. A. Williams, for the plaintiff.

A. Churchill & C. A. Mackintosh, for the defendant.

DEVENS, J. Assuming, but without deciding, that the remedies provided by the St. of 1878, c. 188, to prevent the pollution of rivers, streams and ponds, used as sources of water supply by cities or towns, are not exclusive, and that, on a proper case made, the court, under its general chancery jurisdiction, may restrain any nuisance committed by the defendant in fouling the waters of Charles River, we proceed to consider whether such a case is set forth in the report as entitles the plaintiff to the exercise of this jurisdiction.

By the St. of 1872, c. 343, the plaintiff was entitled to take, hold and convey, for domestic and other necessary use, one and a half millions of gallons of water daily from Charles River, and also to take and hold, by purchase or otherwise, such lands as might be necessary for obtaining, using, distributing and disposing of said water. It was empowered to build reservoirs, aqueducts and dams, and to regulate the use of the water. By § 6, it was made liable to pay any damages that might be sustained by any person in his property by the taking of the water from the stream, but no liability was imposed

upon it to pay damages to any person whose lawful use of the water, under rights previously acquired by prescription or otherwise, might diminish its purity.* The plaintiff accepted the act, declared its intention to take the water to the extent of the full amount allowed, and obtained by purchase and taking the lands necessary for all the purposes of its water supply along the bank of Charles River, and has erected all necessary structures. The water is not taken directly from the river, but by the intervention of a filtering gallery, into which the water passes by percolation through the walls. This is not the less a taking of the water from the river. *Aetna Mills v. Brookline*, 127 Mass. 69. The defendant is pursuing a useful and necessary business, but one which cannot be conducted without the use of water, which, when returned to the stream, is to some extent polluted by his use.

The water is found to be of substantially the same quality, according to chemical analysis, where the plaintiff takes its supply, that it was ascertained to be before the plaintiff decided to take the water under the St. of 1872. As the plaintiff now obtains its water by filtration, no actual damage is done to the quality of the water it uses, and no damage is done to the property of the town, either in the value of its land or waterworks. If the town should hereafter take its water directly from the stream there would be a possibility that some poisonous arsenic, used by the defendant at his works, might possibly be carried, especially during freshets, into the water used by the town, but necessarily in very small quantities suspended in the water.

* The language of this section is as follows: "The said town of Brookline shall be liable to pay all damages that shall be sustained by any person or persons in their property, by the taking of the waters of said Charles River, or other source of supply, or any part thereof, as authorized by this act, or by the taking of any land, rights of way, water rights or easements, or by the erection of any dams, or the construction of any aqueducts, reservoirs, water-ways or other works for the purposes of this act; and if the owner or owners of any property which shall be taken as aforesaid, or other person or persons sustaining damages as aforesaid, shall not agree on the damages to be paid therefor, he or they may apply by petition for an assessment of the damages at any time within three years from the taking of the said property, or the construction of dams or other works occasioning damages as aforesaid, and not afterwards, to the Superior Court in the county in which the same are situated."

But there is no present purpose on the part of the town to obtain its supply except through the earth filter.

No present actual damage resulting from any act of the defendant is therefore shown by the plaintiff, but it contends that the sending down of poisonous substances, which, under certain circumstances, might possibly injure the water as used by it, if it should take the water directly from the stream, is an injury to its right thus to take, such as entitles it to an injunction, even if there is no present purpose of exercising this right.

It contends that it obtained a right to take pure water from Charles River; that any use, prescriptive or otherwise, to foul the stream in the exercise of a manufacture was taken by implication, when the town took the waters by eminent domain, and that the owner of the privilege had his remedy therefor in damages. This is not the true construction of the St. of 1872. The town paid for the quantity of water which it took, as it thereby diminished the supply which the mills and other estates on the banks of the river would otherwise receive. General laws had previously been passed as to defiling streams which were the sources of water supply. Gen. Sts. c. 166, § 6. The St. of 1872 provided, in § 13, penalties for injuries to water which had been taken by the town, but an examination shows that this applies to the water after it had been actually taken, and was in its pipes or reservoirs, and not to that which was its source of supply. The protection of this was left to the law as it then existed or as it might afterwards exist. The St. of 1878, c. 183, legislated fully on this subject, providing very efficient remedies for such injuries as would make the water deleterious to the public. While arguments drawn from subsequent legislation are not very forcible, § 3 of that statute not only contemplates that there may exist easements for drainage and discharge of refuse matter, by legislative grant or by prescription, in the streams which are the sources of water supply, but provides that they shall not be destroyed or impaired.

It may be that any use of the waters of a stream, however long continued, is liable to be controlled, impaired or destroyed, if the legislation of the State shall treat the existence of such a use as incompatible with the health, safety and welfare of the community, and that, even if the market value of property is

diminished, no right is violated, as the mode in which property is enjoyed may be subject to the rights of all in their health and safety, and subordinate to general laws established for their protection. *Commonwealth v. Upton*, 6 Gray, 473. When a long established use of water in a respectable and necessary business is thus impaired or destroyed by legislation, it will be so clearly by express terms or necessary inference; and, if done for the benefit of others, proper compensation will be made therefor. The town possessed a franchise under the law of the State, which gave it the authority to take a certain quantity of water, together with the land necessary for obtaining and afterwards using it. Proper compensation was provided therefor, but no compensation was provided for rights then lawfully existing in the use of the water not taken. It was for the plaintiff to determine, as it must take subject to all the diminution in purity that might be occasioned by a lawful use of it, whether it was such a stream as answered or could be made to answer the purpose. It could not expect riparian owners to surrender rights therein, unless they were, in the interest of public welfare, by a general law forbidden to exercise them, or unless proper compensation was provided therefor.

The plaintiff is not to be treated as strictly a riparian proprietor. Its rights are derived, not from its ownership or occupancy of the bank, but from the legislation which authorizes it so to own or occupy. It draws the water for other purposes, and in greater quantities, than any such proprietor could do, and for this object only it occupies the bank.

But we may profitably consider what are the rules which have been adopted for the protection of riparian and other rights in real estate by courts of equity, in deciding whether those of the plaintiff are invaded by acts like those of the defendant where no actual existing damage is shown. They will be found to divide themselves into two classes: those where the right invaded arises from contract, and the acts done are a violation of the contract; and those where the acts done are such as would by prescription destroy or diminish the right of the plaintiff, if persisted in or continued.

Where any contract is made of which there is a breach, the law implies at least nominal damage; nor will it make any

difference that the form of the action is in tort, if the right violated lies in contract. Thus, the failure of one to pay immediately a check which it was his duty to pay, entitles the holder to nominal damages, although the check be paid before action. *Marzetti v. Williams*, 1 B. & Ad. 415. It is upon this principle that the case of *Peck v. Conway*, 119 Mass. 546, rests, which the plaintiff erroneously deems to show that his rights are so invaded that he is entitled to an injunction. If one purchased a lot of land upon the condition that he would not for fifty years erect a house upon it without the assent of his grantor, it would not be an answer to say that no damage was occasioned either to the person or the property of him in whose favor the condition was made; it is for the obligee in the contract to say whether he insisted on its terms. In *Peck v. Conway*, *ubi supra*, by a reservation in a deed to B., it was provided that no building was to be erected by the said B., his heirs or assigns on the land conveyed, and the grantee of B. was held bound by this reservation to the holder of the estate for the benefit of which the reservation was made. This class of cases has but a remote bearing, if any, upon a case where the parties are strangers to each other, asserting distinct and adverse rights.

By the other class of cases, it is settled that, when a person is asserting a right which at the time does no damage, but which may operate by long continuance to destroy or diminish the right of the plaintiff, even if that right is not then exercised by the plaintiff and there is no present intention of exercising it, he will be restrained by injunction. *Webb v. Portland Manuf. Co.* 3 Sumner, 189. In *Crossley v. Lightowler*, L. R. 3 Eq. 279, 298, this reason is distinctly given; and, without commenting upon the cases individually, we find none among those cited by the plaintiff where there was not either a present damage, as by the erection of a permanent structure directly interfering with the plaintiff's rights, or where the acts done by the defendant were not such as, if continued for a sufficiently long period, would interfere with or destroy an admitted right of the plaintiff.

It is important, therefore, to consider whether, if the quantity of refuse or poisonous matter now brought down from the works of the defendant be permitted to continue to be turned into the

river, the defendant will gain any rights as against the plaintiff, should it determine hereafter to take the water directly from the stream.

The plaintiff has made its election to take the water, and also as to the manner of its taking. We assume that its right of choice in the manner in which it shall take the water from the stream is not exhausted, and that hereafter, should it for any reason desire to do so, it may adopt any other reasonable mode of withdrawing the water from the stream. If the defendant by his present conduct will gain any right on his own part which he does not now possess, and which would prevent this, a good reason why he should be now enjoined is afforded.

The defendant has either a good prescriptive right to do what he does, or he has not. If he has such a right, his exercise of it is doing no harm to any rights which may exist in the plaintiff in its future action, and he is acquiring nothing as against the plaintiff which can hereafter inconvenience it. If he has no such right, either because his prescriptive right, if it existed, was taken away by the taking of the water, or because his use is such that it cannot be prescribed for, or because he has not exercised his asserted right adversely for the period of twenty years, he cannot now gain one, since the acts done by him, as the case is stated by the plaintiff, might be deleterious to public health, and are expressly forbidden by the St. of 1878, c. 183, §§ 2, 3. From the time this statute went into operation, it impliedly prevented the prescription for such a use in a source of water supply from running. The plaintiff deems that such is not its effect, and that, although an act may be prohibited or punished, it will not prevent an individual from justifying by prescription as against another. But it is not easy to see how rights can be acquired by prescription against any one, by acts done in violation of the absolute prohibition of a public statute. Such acts when expressly prohibited are in their inception and continuance unlawful as against the public authority, and they cannot become lawful as against the individual members of the public, however long they may have been exercised. When the statute forbids anything to be done, the right to do it is not to be granted or acquired. However long a nuisance may have been continued, those affected thereby are entitled to a remedy

to the extent at least to which the acts by which it was continued were forbidden by law. *Mill v. Commissioner of New Forest*, 18 C. B. 60. *Rochdale Canal v. Radcliffe*, 18 Q. B. 287. *Staffordshire & Worcestershire Canal v. Birmingham Canal*, L. R. 1 H. L. 254. *Rhodes v. Whitehead*, 27 Texas, 304. In *Mills v. Hall*, 9 Wend. 315, a dam set the water back and rendered it stagnant, thereby causing disease; and it was held that the length of time which it had stood would not prevent its being an actionable nuisance to the extent to which it was indictable, although the plaintiff could not sustain an action for damage done to his land by flowing, as to that extent the owner of the dam had acquired, and could acquire, a right by long user.

But whether an individual could or could not, as against himself, grant a permission to do those acts expressly forbidden by statute, one standing in the position of the plaintiff could not. Prescription assumes that there has been a grant, which by lapse of time has been lost. It necessarily assumes that there is some one having a capacity to grant. No board and no authority exists which has the power under the law to grant the right to corrupt or pollute the quality of the water for domestic uses, or to render it deleterious to health, in streams which are used as sources of supply to cities or towns. The plaintiff has certainly no such power: it is a corporation performing a public duty; the property which it holds is in public trust; it could not, either by express grant, or by submission to user, or by simple neglect, enable a person to complete a title by prescription, when the acts done in the assertion of such a title are prohibited by statute. *Mill v. Commissioner of New Forest*, *Rochdale Canal v. Radcliffe*, and *Staffordshire & Worcestershire Canal v. Birmingham Canal*, *ubi supra*.

The acts done by the defendant which corrupt or impair the quality of the water, if done without right after the passage of the St. of 1878, are of this character. The provision in that statute, that prescriptive rights of drainage or discharge are not impaired or destroyed to the extent to which they lawfully exist at the date of the passage of the act, implies that none are to be gained thereafter in streams which are the source of water supply, if deleterious to health. We do not therefore perceive that

any right can be gained against the plaintiff, or that it needs any injunction to protect its right to take the water directly from the stream, or that this right is now invaded.

The plaintiff contends that the St. of 1878, c. 183, in prohibiting drainage or refuse matter from being put into the river so as to corrupt or impair the quality of water, makes it an offence to do so not only where the water supply is taken, but also at or near the factory, and that the evidence shows that the water is there corrupted. Even if this construction is correct, which we do not decide, the plaintiff cannot ask an injunction on that account, as such corruption at that place would not be an injury to it as a private nuisance, even if it might be to others, or even if, as a public nuisance, it is remediable by indictment.

Nor should an injunction be granted on account of any danger that the works of the defendant may be increased, and then injury be done to the water where the plaintiff receives it, or that injury may be now done which cannot be proved by analysis, or that hereafter in the near future the plaintiff may wish to increase its supply of water. Apprehended danger is indeed a ground for issuing an injunction, but it must be apprehended upon a state of facts which show it to be real and immediate.

We have preferred to dispose of the case upon the facts as they are now presented, without discussing the inquiry whether, since the St. of 1878, c. 183, the present is the proper form of remedy, or considering many other important questions ably argued by counsel on both sides. Should hereafter a different state of facts be shown in evidence and brought before the court, it may be necessary to consider them. Upon the facts as they now appear, the

Bill must be dismissed.

ERNEST A. HARRIS *vs.* CHARLES G. MACKINTOSH.

Norfolk. May 6. — July 5, 1882.

An owner of land on a natural stream may maintain a bill in equity to restrain another owner of land on the stream from carrying on business on his land in such a way as to pollute the waters of the stream to the material injury of the plaintiff; and such right is not taken away by the St. of 1878, c. 183, which confers certain powers over streams upon the State Board of Health.

An order in equity refusing a motion for issues to the jury, and which is excepted to, is subject to revision on a report of the case.

On a bill in equity by a riparian proprietor of land on a natural stream to restrain another proprietor from so conducting his business as to pollute the waters of the stream, and to cause disagreeable odors at the plaintiff's land, the answer denied that the stream was polluted or disagreeable odors produced at the plaintiff's land, or that the plaintiff intended to use his land as a residence, and alleged that the defendant had a prescriptive right to carry on his business in the manner he was carrying it on. The defendant filed a motion for issues to a jury. This motion was overruled by the judge before whom the case was heard. *Held*, on a report of the case, that the motion should have been granted.

DEVENS, J. This is a bill in equity, in which the plaintiff alleges that the defendant is carrying on a noxious and offensive trade, that of wool-pulling and the washing of sheep-skins, at a factory in Dedham, on the bank of Charles River, thereby corrupting and polluting the waters of the river, to the nuisance of the plaintiff, who is the owner of a lot of land on the stream below the factory, which lot he purchased for the purpose of building a house and otherwise improving the same. The injury complained of proceeds from the disagreeable odors attending the defendant's business, which are alleged to be perceptible upon the plaintiff's premises and destructive to the occupation of the same, and from the corruption of the water of the stream, as it flows by the plaintiff's lot, so that it would not be safe for drinking purposes for men or animals, should the lot be occupied for a residence, or cattle be depastured thereon.

The defendant, admitting that he is engaged in the business of wool-cleansing, although not of wool-pulling, as alleged by the plaintiff, and contending that his business is incorrectly described by the plaintiff, denies that it is a noxious and offensive trade, that disagreeable odors are caused at the plaintiff's lot, as alleged, or that the water of the stream, as it flows thereby, is rendered unfit for drinking purposes, or that the plaintiff has

any intention of occupying the same as a residence or for the purpose of depasturing cattle. The defendant further asserts that his present building has existed for more than twenty years, and has during all that time been continuously used, by himself and those under whom he claims, for the prosecution of the same business which he now conducts there, and in the same way in which it is at present conducted. If in any manner injury is perceived at the plaintiff's lot, either by disagreeable odors, or by the impurity of the water flowing thereby, he asserts his right as against the plaintiff, or those owning his estate, to conduct his business as it is now carried on, even if to some extent the air is there affected, or the water rendered foul and impure.

The case is before us upon the report of the judge who tried it, in connection with the facts which appear in the report in *Brookline v. Mackintosh*, ante, 215, so far as they are applicable, and the additional facts found by the judge, that the defendant's factory is sixty feet from the plaintiff's land; that the plaintiff bought the land, which was then an unimproved wood-lot, for the purpose of immediately building a dwelling-house thereon for his own use, at a point two hundred and fifty feet distant from the defendant's factory, but has not yet built upon it; that disagreeable odors from the defendant's business are at times perceptible upon the plaintiff's lot; that the water of the stream, as it flows by the plaintiff's lot, would not always and under all circumstances be safe to use for drinking purposes, in consequence of the use of arsenic at the defendant's place; that the value of the plaintiff's lot, as a place of residence, is made less by reason of the defendant's business; that this difference in value can be estimated in money; that when the plaintiff bought his lot, he intended to cut ice in the river, to water cattle there, and to use the water for domestic purposes; and that, in August 1880, when the plaintiff bought his lot, no business was carried on at the defendant's factory, and the plaintiff had no notice that business was to be done there.

The report further states, that the defendant filed a motion that issues be framed to be tried for a jury, which motion was overruled, and the defendant excepted. The judge, at the request of the parties, reserved the case for the consideration of the full court, such decree to be entered as should seem proper.

The defendant contends that, according to general principles of the common law, the plaintiff has a complete remedy upon the facts alleged by him, and that he should be compelled to resort to his action at law before seeking relief in equity. But it is quite clear that a bill in equity may be maintained by a riparian owner to restrain another from polluting the stream to the plaintiff's material injury. *Merrifield v. Lombard*, 13 Allen, 16. *Woodward v. Worcester*, 121 Mass. 245. The acts of the defendant, as alleged, tend to create a nuisance of a continuous nature, for which an action at law can furnish no adequate relief.

The defendant further contends, that the St. of 1878, c. 183, has conferred upon the State Board of Health full jurisdiction and the right to investigate, hear and determine as to the entire subject-matter of the complaint of the plaintiff; that by it such matter is properly and legally cognizable and relievable; and that since the passage of that statute the plaintiff is not entitled to pursue any remedy which he might have had under the general equity powers of this court. This statute is intended to protect the sources of water supply of cities or towns from pollution by sewage, drainage, refuse or other polluting matter, although it does not destroy rights of drainage or discharge as they lawfully exist at the time of its passage. It places such sources of water supply under the supervision of the State Board of Health, authorizes the application thereto of cities or towns whose rights are invaded, provides for an enforcement of the orders of such board by application to this court or one of its justices, and gives to parties aggrieved a right of appeal to a jury. It appears that Charles River is a source of water supply to the town of Brookline. It is not necessary now to consider whether the sole remedy for a city or town, whose source of water supply is polluted, is to be found under the provisions of the statute above cited, nor whether any remedy is intended to be afforded thereby to riparian owners entitled to the water of a stream which is also used as a source of supply to a city or town. If the riparian owner may avail himself of that statute, his remedy thereunder is not exclusive, and we can perceive no expressed or implied intention that he shall be deprived of ordinary remedies which are provided where one has just ground of complaint against another. The statute has in view a great

public purpose, and is directed to the protection of the public, or that large portion of it interested in the water supply of a city or town. The only application upon which it is in terms made the duty of the State Board of Health to act in investigating any cause of complaint, is that of the city or town. The injury of which the plaintiff complains is an individual injury; it is that done to himself in his use of his property by an alleged wrongful act of the defendant; and, even if the same act be also an injury to the water supply of a town, the plaintiff is not thereby deprived of his ordinary remedy.

At the hearing, the defendant submitted a motion that issues be framed for a jury, which motion was overruled by the presiding justice, and the defendant excepted. While the order directing or refusing an issue to a jury has been held to be within the discretion of the presiding judge, and therefore not properly the subject of an exception; *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field*, 8 Gray, 621; *Brooks v. Tarbell*, 103 Mass. 496; yet under the Gen. Sts. c. 113, § 10, an appeal lies from such an order. *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45. *Ross v. New England Ins. Co.* 120 Mass. 113. When, therefore, no final decree was entered by the presiding judge, but the whole case was reserved by him for the consideration of the full court, it was intended by him to bring before us, and he has so brought, not merely the questions of strict law, but those of legal discretion also, which must necessarily enter into the final decree, or be disposed of before making such decree. It is not important, therefore, that objection to his action upon this motion should have been made by appeal, and not by exception. A report upon the equity side of the court submits for revision the inferences of fact as well as the conclusions of law involved in it. *Wright v. Wright*, 13 Allen, 207, 209. *Parks v. Bishop*, 120 Mass. 340. It should equally submit for revision those questions, even if of judicial discretion, which are the subjects of appeal.

The facts stated in the bill and controverted in the answer, as well as those set up in the answer as tending to establish a defence by prescription or estoppel as against the plaintiff, present a series of inquiries highly proper for the consideration of a jury. *Ingraham v. Dunnell*, 5 Met. 118. The alleged nuisance consists in the exercise of a necessary and useful manufacture, even if it

be one attended by some disagreeable circumstances. No irreparable injury is threatened to the plaintiff. His lot has not heretofore been, nor is it now, used for a residence or a pasture. It is denied by the defendant that the plaintiff has any intention so to use it, or that he has bought it for any such purpose. The defendant also denies that the air is infected upon the plaintiff's lot, or that the water as it passes thereby is polluted. The defendant further asserts a right by prescription to do all that he has done or is doing. Without passing upon the numerous legal questions that have been argued as to this prescriptive right, as it appeared at the hearing before the judge, it may be said that the mode in which the defendant or his grantors have used their property, the manner in which the business has been heretofore and is now conducted, the circumstances under which active business was for a time suspended and afterwards resumed, the knowledge of such business by the plaintiff's grantors, their assent or their capacity to assent, present a series of inquiries proper to be dealt with by a jury upon issues properly framed. At the trial of such issues the facts may or may not appear as they did before the judge, and by their findings it may be determined whether the defendant is so using his property as to cause an injury to the air or water on the premises of the plaintiff such as would constitute a nuisance, and whether the defendant establishes a right by prescription to do that which he actually does.

Under all the circumstances of the case, without passing upon the question whether the defendant had a constitutional right to a trial by jury, we are of opinion that it was erroneous to refuse to the defendant the right to have issues framed which should submit to a jury the important facts which were in controversy between himself and the plaintiff.

As, upon the reservation, such decree is to be entered as shall seem proper, it is therefore ordered that *Issues be framed.*

M. Williams, Jr. & C. A. Williams, for the plaintiff.

A. Churchill & C. A. Mackintosh, for the defendant.

HENRY J. DUNHAM vs. INHABITANTS OF STOCKBRIDGE.

Berkshire. Sept. 13, 1881. — Sept. 7, 1882. LORD, DEVENS & C. ALLEN, JJ., absent.

If a town offers a reward for the detection and conviction of an incendiary, and information which leads to the discovery of the criminal is first obtained by a state detective, (who is prohibited by the St. of 1875, c. 15, § 6, from claiming any part of the reward,) and he communicates such information to another person, upon whose advice the criminal confesses his guilt to him and to the officer together, and conviction is secured upon proceedings founded on the confession, such person is not entitled to maintain an action against the town for the recovery of the reward.

CONTRACT to recover a reward of \$500, offered by the defendant town, for the detection and conviction of the person or persons who set fire to the buildings of one Jeremiah Buck. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff and John Crosby, Jr., a state detective under the St. of 1875, c. 15, who had been requested by the defendant's selectmen to investigate and discover the incendiary, worked in the matter together and in concert: the plaintiff to obtain the offered reward, and Crosby in the discharge of his duty, he not being authorized to receive the reward. They had been unable to obtain evidence to justify the arrest of any person for having set fire to said buildings, until one Rebecca Leman, who had been committed to jail in Pittsfield to await trial on a charge of adultery, while in jail, sent for Crosby and told him she would state what she knew about said fires, if he would have the plaintiff come and see her, and she should be advised by him to do so. Crosby tried to have her tell him alone, but she refused to tell what she knew unless the plaintiff advised her. Thereupon Crosby wrote communicating this request and proposal to the plaintiff at Stockbridge, who came, saw and advised Leman to make the statement; and, after he had talked with her, he told Crosby that she was then willing to tell what she knew; and she was bailed by the plaintiff and Crosby, and went with them to Crosby's office, where, in the presence and hearing of both the plaintiff and Crosby, she verbally confessed that

she was the person who set fire to said buildings, and gave the particulars thereof; and the plaintiff reduced the material part of this confession to writing. No other or further investigation touching these fires was made after said confession; and the plaintiff then and there made out three complaints, in which Crosby was the complainant, against Leman for the offences thus confessed, which complaints Crosby, upon the plaintiff's request, signed and took, and procured warrants upon, and arrested Leman forthwith thereon. She was taken to the District Court of Central Berkshire, to which said warrants were returnable, and was at once arraigned on each, and to each pleaded guilty, and the plaintiff and Crosby were recognized as witnesses thereon, and she was committed in default of bail to jail for trial; and at the ensuing criminal term of the Superior Court three indictments were found against her for said offences, to each of which she pleaded guilty, and was sentenced thereon. There was no evidence controlling these facts upon any point material to these exceptions.

Crosby was a witness for the plaintiff at the trial of the present case, but disclaimed any right to share in the reward.

The defendant requested, among others, the following instruction: "3. Knowledge and information obtained by a state detective and imparted to the plaintiff, whereby a confession was made to both the plaintiff and the state detective by an incendiary for whose detection and conviction a reward was offered, would not entitle the plaintiff to a verdict, even though conviction is had by the incendiary's pleading guilty to the offence on the complaints and indictments had on such confession."

The judge refused the defendant's requests for instructions; and in relation to the third request instructed the jury that, "if the knowledge and information therein referred to was in substance such as to detect and convict the offender, then its impartation by Crosby to the plaintiff would not entitle the plaintiff to claim the reward; but if, on the other hand, it was merely information that Leman upon certain conditions would disclose what she knew as to the setting of the fires, and the first statement by her leading to her detection and conviction was obtained by the subsequent influence and advice of the plaintiff, then he might recover."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

T. P. Pingree & J. M. Barker, for the defendant.

A. J. Waterman, for the plaintiff.

FIELD, J. The St. of 1875, c. 15, entitled "An act to establish a state detective force for the better enforcement of the laws," provides, in § 5, that "said chief and said detectives shall aid the Attorney General, district attorneys and magistrates in procuring evidence for the detection of crime and in the pursuit of criminals," and in § 6, that "neither the chief nor any member of the force shall receive any share in rewards or any compensation, gift or gratuity, directly or indirectly, on account of his official services, except rewards publicly offered, and then only when, in special cases and after the services have been rendered, permission so to do is granted by the Governor and Council." It does not appear that permission to Crosby to receive any share in this reward has been granted by the Governor and Council, and it must be taken that Crosby was prohibited by law from claiming any part of this reward. See also *Pool v. Boston*, 5 Cush. 219.

If Crosby had not been prohibited by law from claiming this reward, and if receiving a confession under the circumstances stated in the exceptions can be called detecting a criminal, upon which we express no opinion, either Crosby alone, or Crosby and the plaintiff jointly, would be entitled to the reward. There is no evidence of any independent act on the part of the plaintiff that would entitle him alone to claim the whole reward. The information that led to the confession was first received by Crosby and by him communicated to the plaintiff, and although this was information that she would tell what she knew about the fires, and not that she herself had set them, yet this last statement was obtained by the plaintiff acting on the specific information given by Crosby and at Crosby's suggestion or request, and was obtained by his persuading her to tell what she knew about the fires, and was literally what she knew about them.

No independent act not contemplated by Crosby, and not specifically within the terms of his request, was done by the plaintiff that led to the detection and conviction of Leman. As

Crosby is prohibited by law from claiming the reward, the plaintiff cannot claim in his right or jointly with him. To hold otherwise would be to defeat the intent of the statute. The plaintiff cannot receive the reward in whole or in part to Crosby's use. Undoubtedly a person may act in concert with an officer, and while so acting may discover evidence which may entitle him to the whole reward, but when the information which led to the discovery was first obtained by the officer, and then such information was communicated by him to another person, who acted on it specifically according to the request and direction of the officer, it is doubtful whether such a person must not be regarded as the agent of the officer. It may be that in this case, without the advice of the plaintiff, Leman might never have confessed her crime; but it is also true that there is no evidence that, if the information received by Crosby from her had not been communicated to the plaintiff, the plaintiff would ever have given the advice, or have known or suspected that Leman had any information to give. On the evidence, we think that the defendant's third request for instructions should have been given, and that the distinction made by the learned justice in the instructions given in place of it cannot be supported.

Exceptions sustained.

JAMES T. ROBINSON, Judge of Probate, *vs.* DAVID C.
MILLARD & others.

Berkshire. Sept. 12. — 22, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

The sureties on a general bond given by an executor, who has also given a special bond with sureties to account for, and dispose of according to law, the proceeds of a sale, under a license of the Probate Court, of the real estate of his testator, remaining after payment of debts, legacies and charges of administration, are not liable for the neglect of the executor to pay over to the residuary legatees entitled thereto the balance of the proceeds of such sale, although the executor charges himself in his general account with the whole of such balance.

CONTRACT, for the benefit of the residuary legatees under the will of Joshua L. Millard, upon a bond given to the Probate

Court by the executors of the will, and containing the usual conditions. Trial in this court, before *W. Allen, J.*, who reported the case for the determination of the full court, in substance as follows :

The final account of the executors was allowed March 22, 1880, and there remains in their hands, as appears from said account, the sum of \$7381.10 to be divided among the residuary legatees, which they neglect to pay over.

The records of the Probate Court, if competent for the purpose, show that, upon the petition of the executors, representing that it was necessary to sell real estate of the testator to raise the sum of \$1715 to pay debts of the testator, that it was necessary therefor to sell a part or the whole of the home farm, which was appraised at \$12,200, and that by a sale of a part thereof the residue would be greatly injured, and praying that they might be licensed to sell the whole thereof, they were duly licensed to sell the whole of said home farm ; that they gave a bond which was required in the order licensing such sale, with sureties, in the sum of \$15,000, conditioned that they "should account for, and dispose of according to law, all proceeds of the sale remaining after payment of debts, legacies and charges ;" that they sold the whole of said real estate under the license, for the sum of \$11,000 ; that they charged themselves in their general account with the whole of said sum ; and that the balance of \$7381.10, above mentioned, being the whole residue of the estate, is wholly the proceeds of said sale remaining after the payment of debts, specific legacies and charges of administration.

This evidence was offered by the defendants, and objected to by the plaintiff. The judge admitted the evidence, and found the facts stated to be true ; and found for the defendants, upon the ground that the neglect to pay over the proceeds of the sale of the real estate remaining after the payment of the debts and charges was not a breach of the condition of the bond in suit.

B. Palmer & H. C. Joyner, for the plaintiff.

J. Dewey, for the defendants.

DEVENS, J. The question is here presented as to which class of sureties are responsible for the misconduct of the executors of

the will of Joshua L. Millard, who, having been authorized to sell more of the real estate of the testator than was necessary for the payment of debts, now neglect, after payment of debts, specific legacies and charges of administration, to pay over to the residuary legatees entitled thereto the balance of the proceeds of said sale.

When the bond in suit was made, the executors were required to administer, according to law and the will of the testator, all his goods, chattels, rights and credits, and the proceeds of all his real estate that might be sold for the payment of his debts or legacies which should come to their possession, and to give bond accordingly. Gen. Sts. c. 98, § 7. The general bond, upon which it is now sought to render the sureties responsible, followed this form. When the executors were licensed to sell real estate more than was necessary for the payment of debts and charges, which might be done in the discretion of the Probate Court, they were required to give a special bond, with sureties, conditioned to account for and dispose of according to law all proceeds of the sale remaining after payment of the debts and charges. Gen. Sts. c. 102, § 6.

The balance in the hands of the executors consists wholly, as the fact is found by the presiding judge, of the proceeds of real estate, thus allowed to be sold, remaining after such payment. It is obvious that the second bond is not intended as additional security for the first, but that it concerns a different subject matter, in dealing with the estate of a deceased person, and therefore that the two bonds may well coëxist as securities for distinct liabilities. The sale of real estate, so far as it exceeds the amount required for the payment of debts and charges, is permitted, because the real estate which is required for the purposes of administration may be so united with that which should go to the heir or devisee that they cannot be separated except by converting the whole into money. While the proceeds of such a sale, so far as they are needed for the payment of debts and charges, were to be accounted for by the executors under their general bond, the surplus constituted a fund to be accounted for and disposed of according to law under this special bond, and such is its condition. *Bennett v. Overing*, 16 Gray, 267.

It was not, in the present case, a disposition of this surplus according to law, to transfer it to the general account of the executors, nor could the sureties upon the general bond be thus rendered responsible for a liability properly incurred by the sureties upon the special bond. The terms of the general bond, which limited the responsibility of the sureties thereon to the proceeds of real estate sold for the payment of debts or legacies, could not be thus extended. It has been held that, even if the allowance of a guardian's account conclusively settles that he is chargeable with the whole balance apparently due, it is not conclusive upon the question which class of sureties are responsible for his failure to do with that balance what his duty required. This must depend upon the source from which the money thus charged against him was derived. *Lyman v. Conkey*, 1 Met. 317. *Mattoon v. Cowing*, 13 Gray, 387. The fact, therefore, that the executors here saw fit to charge themselves in their general account with the balance remaining after payment of debts, legacies and charges, does not conclude the sureties under the general bond. Where one may rightfully hold a sum of money or other property in either of two capacities, his own election may determine, even as against sureties, in which capacity he thus holds it; but such case is readily distinguishable from the present.

It is contended further, that, as this action is brought on behalf of the residuary legatees and devisees, all the money derived from the sale of the land might properly have been paid over to and held by the executors under their general bond; and that the failure to pay over this money to them is therefore a breach of this bond. But the only legacies for the payment of which the real estate could be sold were those which were definite in their character, and the only money derived from the sale of the real estate for which the sureties upon the general bond were responsible, was that received therefor. The residuum of an estate is not a part of it to be administered, but what remains after administration, properly so called, is concluded. The disposition according to law required by the special bond was the transfer, after administration had been completed, so far as it related to debts, legacies and charges, of the balance which remained to be accounted for to those then entitled thereto by the will.

Judgment affirmed.

ALFRED P. MOREWOOD *vs.* CHARLES T. WAKEFIELD.

Berkshire. Sept. 12. — 29, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

By the St. of 1867, c. 130, all dogs are required to be licensed and to wear a collar; and a penalty is imposed on any person keeping a dog contrary to the provisions of the act. By § 7, mayors of cities and the chairman of selectmen of towns are required annually, within ten days from July 1, to issue a warrant to one or more police officers or constables, directing them to forthwith kill or cause to be killed all dogs not licensed and collared according to the provisions of this act, and to enter complaint against the owners or keepers thereof; "and any person may, and every police officer or constable shall, kill or cause to be killed all such dogs, whenever or wherever found." *Held*, that the last clause authorizes any person to kill a dog which is licensed, but has no collar on, provided he can do so without committing a trespass, although such killing is before July 1, and no warrant for the killing has been issued.

TORT for the shooting by the defendant of the plaintiff's dog. Trial in the Superior Court, without a jury, before *Mason, J.*, who allowed a bill of exceptions, in substance as follows:

The plaintiff's dog was duly licensed, was not dangerous or mischievous, and was not guilty of any of the acts mentioned in the Gen. Sts. c. 88, § 60, but his head was so small and tapered from the neck so greatly that no collar would stay upon his neck. On June 14, 1881, the dog, without any collar on, while passing the residence of the defendant, was attacked by a dog belonging to the father of the defendant and severely injured, and was shot and killed by the defendant, without the knowledge and against the will of the plaintiff.

The defendant justified the killing under the provisions of the St. of 1867, c. 130, § 7, by which he contended that any person may kill all dogs, whenever and wherever found, not wearing a collar and being off from the premises of such dog's owner, and not under the care of his owner or keeper.

The plaintiff contended that the statute did not authorize or justify the killing, against the owner's will, of a dog not dangerous or mischievous, nor guilty of any of the acts mentioned in the Gen. Sts. c. 88, § 60, and which was licensed and without a collar, until the warrant mentioned in the St. of 1867, c. 130, §§ 7, 8, 9, had been issued; and that the right then to kill existed only from the issue of the warrant in July until its return in October of the same year; and asked the judge so to rule.

But the judge declined so to do, and ruled that any person was justified in killing a dog without a collar upon the highway, whenever and wherever found; and ordered judgment for the defendant. The plaintiff alleged exceptions.

T. P. Pingree & J. M. Barker, for the plaintiff.

E. M. Wood, for the defendant.

C. ALLEN, J. The question in the present case comes down to this: whether the provision in the St. of 1867, c. 130, § 7, that "any person may, and every police officer and constable shall, kill or cause to be killed all such dogs, whenever or wherever found," means all dogs not licensed and collared according to law, or all dogs which have been ordered to be killed by the warrant which is to be issued within ten days from the first day of July, for the killing of unlicensed and uncollared dogs. By earlier sections of the same statute, licenses for dogs may be obtained before the 30th day of April, as well as at any time thereafter; and every dog must at all times have both license and collar, or its owner or keeper is liable to a penalty. §§ 1, 2, 5. Then follow other provisions designed to secure a more full observance of the requirements as to licenses and collars. The assessors are annually to take a list of dogs owned or kept on the first day of May, and return the same to the town clerk on or before the first day of July; and within ten days after the first day of July, the warrant is to issue to one or more police officers or constables, directing them to kill all dogs not licensed and collared, and to enter complaint against the owners or keepers thereof; after which comes the special provision above quoted. It has heretofore been held that the warrant need not specifically designate the dogs to be killed, and that a warrant is sufficient which orders the killing of all dogs within the town, not duly licensed and collared. *Blair v. Forehand*, 100 Mass. 136. No previous and formal adjudication is necessary. This legislation, like that which authorizes the destruction of horses and cattle infected with, or exposed to infection by, a contagious disease, is justifiable as an exercise of necessary police power. This doctrine is not controverted. But the argument is pressed upon us, that no extension should be given by construction to the provisions which confer so large a power; that dogs are now a valuable species of property; that their education or training is now carried so far, that they are no

longer to be regarded in the same light as formerly; that they often are not only of much pecuniary value, but are objects of special affection; and that, in short, they should now be entitled to the same protection as horses and other valuable domestic animals. We are not insensible to the force of these considerations. Our duty, however, on the present occasion, is limited to the interpretation of the statute; and a careful examination of all its provisions has led us to the conclusion that the purpose of the Legislature was broader than that which is insisted on by the plaintiff. The true meaning of the statute is, that any person may kill an unlicensed or an uncollared dog, whenever or wherever found, at any time of the year, provided he can do so without a trespass; that every police officer and constable shall kill or cause to be killed all such dogs, whenever or wherever found; and that, within ten days from the first of July, a warrant shall be issued to one or more police officers or constables, directing them to proceed forthwith to kill or cause to be killed all such dogs, and to enter complaint against the owners or keepers thereof; that is to say, it is made the special duty of the officers to whom the warrant is issued to look for and find and destroy all such dogs, and also to enter complaints. The statute is certainly rigorous; but it is only necessary to observe its requirements as to a license and collar, and a dog will have the same legal protection as a horse or an ox.

Exceptions overruled.



INHABITANTS OF SHUTESBURY *vs.* INHABITANTS OF HADLEY.

Franklin. Sept. 21, 1881. — Sept. 7, 1882. LORD, DEVENS & C. ALLEN, JJ., absent.

In an action by the town of S. against the town of H. for the support of a female pauper, whose settlement through her husband was alleged to be in H., it appeared that the town of A. had previously sued the town of S. for the support of the same pauper; that in that action S. set up in its answer that the pauper's husband had his settlement in H.; that the question of his settlement was the only question in issue in that action; that, on filing the answer, H. was requested by A. to assume the prosecution of the action, and did so, and that A. obtained a judgment, which was satisfied by S. *Held*, that these facts did not estop S. from raising the question of the husband's settlement in the present action.

In an action by one town against another for the support of a female pauper, the main issue was whether the pauper's husband, who was an alien, and was assessed and paid taxes in the defendant town from 1837 to 1845, and resided there until April 1, 1846, was domiciled there on April 1, 1836. The plaintiff offered in evidence a certified copy from the town clerk's records of another town, purporting to be the copy of a marriage certificate made in April 1837, certifying that the magistrate joined the pauper's husband and a former wife in marriage on May 24, 1836, and describing the husband as of the defendant town. The plaintiff also introduced evidence that the husband had lived in the defendant town several months before his first marriage, but the witnesses were unable to fix the date of that marriage. The defendant admitted that the husband was married to his first wife on the day named in the certificate; but objected to the admissibility of the certificate to show that at that time the husband was a resident of the defendant town. But the judge admitted it as *prima facie* evidence that the husband's residence was in the defendant town on the day named, but not of his residence there before that date. *Held*, that the defendant had no ground of exception.

In an action against the town of H. for aid furnished a female pauper in 1878 and 1879, it appeared that the husband of the pauper, an alien, being of age, lived in H. ten years from 1836 to 1846, and paid taxes there for five years during that time; and died in 1872, never having been naturalized. *Held*, that, under the Gen. Sts. c. 69, § 1, *cl.* 12, and the St. of 1868, c. 328, as amended by the St. of 1871, c. 379, the husband of the pauper gained a settlement in H., and that the pauper gained a derivative settlement from him.

CONTRACT for support furnished from June 1, 1878, to July 5, 1879, to Sarah Beals, whose settlement, through her husband, John Beals, was alleged to be in the defendant town. Trial in the Superior Court, before *Colburn, J.*, who allowed a bill of exceptions, in substance as follows:

It was agreed that John Beals was an alien and was never naturalized; that he was assessed and paid taxes in Hadley from 1837 to 1845, inclusive; and that he resided in Hadley until April 1, 1846, when he removed to Whately. It was also agreed that he was of age on April 1, 1836, or before. The main issue in the trial was whether John Beals was domiciled in Hadley on April 1, 1836, so as to give him a settlement there by a ten years' residence and five years' payment of taxes.

It appeared that in 1878 the town of Athol sued the town of Shutesbury for support furnished to Sarah Beals; that in that action Shutesbury set up in its answer that John Beals had his settlement in Hadley; that the question of his settlement was the only question in issue in that action; that, on filing the answer, Hadley was requested by Athol to assume the prosecution of the action, and did so, and employed counsel, and the counsel

so employed conducted the suit, and obtained a judgment for the plaintiff, which was satisfied by Shutesbury.

Upon these facts, the defendant contended, and asked the judge to rule, that the plaintiff was estopped to raise and contest in the present action the question of John Beals's settlement as against the defendant. But the judge ruled that there was no estoppel; and the defendant excepted.

As tending, in connection with other evidence, to show that John Beals had his settlement in Hadley by a ten years' continuous residence there prior to April 1, 1846, the plaintiff offered in evidence a certified copy from the town clerk's records of Deerfield, purporting to be the copy of a marriage certificate made in April 1837, certifying that the magistrate joined John Beals and Mary Ann Horton (a former wife) in marriage on May 24, 1836, and describing John Beals as of "Hadley Upper Mills." One or more of the plaintiff's witnesses had testified that John Beals lived in Hadley several months before his first marriage, but were unable to fix the date of that marriage.

The defendant admitted that John Beals was married to Mary Ann Horton on May 24, 1836, but objected to the admissibility of the record to show any other fact there certified to, especially that John Beals was at the time a resident of "Hadley Upper Mills." But the judge admitted the certificate as *prima facie* evidence of the facts recited, and ruled that it was only *prima facie* evidence of John Beals's residence in Hadley on May 24, 1836, and not of his residence there prior to that date; and so instructed the jury. To the admission of this evidence the defendant excepted. It was admitted that Hadley Upper Mills was a part of Hadley.

The defendant contended that, John Beals being an alien when he died, in 1872, Hadley could not be charged for the support of his widow by virtue of any laws of this Commonwealth on the subject. But the judge ruled that the plaintiff might recover if a ten years' continuous residence of Beals in Hadley, with five years' payment of taxes, was made out; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. Delano, for the defendant.

A. De Wolf, for the plaintiff.

FIELD, J. The plaintiff contends that Sarah Beals had a settlement in the defendant town, in consequence of a settlement acquired by her husband, John Beals, under the St. of 1793, c. 34, § 2, *cl.* 12; the Rev. Sts. c. 45, § 1, *cl.* 12; the Gen. Sts. c. 69, § 1, *cl.* 12; and the Sts. of 1868, c. 328, § 1, and 1871, c. 379, § 1. *Worcester v. Springfield*, 127 Mass. 540. *Endicott v. Hopkinton*, 125 Mass. 521.

The judgment in the action of Athol against Shutesbury clearly did not estop Shutesbury from proving in this action against Hadley where the settlement of Sarah Beals in fact was. The town of Hadley was in no sense a party to that action, nor in privity with either of the parties. It claimed no rights in the action derived from the plaintiff, and was not vouched in by the defendant to defend the action. It was not responsible over to the town of Shutesbury, either by operation of law or by contract, for the damages obtained in that action. It prosecuted the suit, apparently, because Shutesbury, in denying the allegation of Athol that John Beals's settlement was in Shutesbury, had also averred that it was in Hadley. Evidence that it was in Hadley would undoubtedly be competent under this denial, because if it was in Hadley it was not at the same time in Shutesbury, but the issue between Athol and Shutesbury was whether the settlement was or was not in Shutesbury, as alleged, and in the determination of that issue Hadley had no interest, and was a stranger to the action. *Braintree v. Hingham*, 17 Mass. 432. As evidence tending to show that, on May 24, 1836, John Beals resided in Hadley, the judge admitted a certified copy from the town clerk's records of Deerfield, purporting to be the copy of a marriage certificate made in April 1837, certifying that the magistrate joined John Beals and Mary Ann Horton (a former wife) in marriage on May 24, 1836, and describing John Beals as of Hadley Upper Mills, which was a part of Hadley. It was incumbent on the plaintiff to prove that John Beals had resided continuously in Hadley from April 1, 1836, to April 1, 1846. The judge admitted the certificate as *prima facie* evidence that John Beals's residence was in Hadley on May 24, 1836, and not of his residence there

before that date. Several witnesses testified that John Beals lived in Hadley several months before his first marriage, and the defendant admitted that he was married to Mary Ann Horton on May 24, 1836. As it was incumbent on the plaintiff to prove a residence "for the space of ten years together," the evidence was not immaterial.

The Revised Statutes, which went into effect from and after the last day of April 1836, provided, by c. 75, § 17, that "every justice and minister shall keep a record of all marriages solemnized before him, and in the month of April, annually, shall make a return, to the clerk of the town in which he resides, of a certificate, containing the christian and surnames, and places of residence, of all the persons who have been by him joined in marriage, within the year then last past, and also the time when solemnized," &c., "and all marriages, so certified to the clerk, shall be forthwith recorded by him in a book to be kept for that purpose;" and by § 25, "the record of a marriage, made and kept as before prescribed, by a justice of the peace or minister, or by the clerk of any town, or a copy of any such record duly certified, shall be received in all courts and places, as presumptive evidence of the fact of such marriage."

This last provision was substantially reenacted in the Gen. Sts. c. 106, § 21. But the Gen. Sts. c. 21, § 6, provide that "the record of the town clerk relative to any birth, marriage, or death, shall be *prima facie* evidence, in legal proceedings, of the facts recorded. The certificate signed by the town clerk for the time being shall be admissible as evidence of any such record."

These two independent provisions are in the Public Statutes, Pub. Sts. c. 145, § 29; c. 32, § 11. The last of these provisions was enacted for the first time in the Gen. Sts. c. 21, relating to "the registry and returns of births, marriages and deaths." The colonial and provincial statutes, and also the early statutes of the Commonwealth on the subject, are cited in *Kennedy v. Doyle*, 10 Allen, 161. After the Revised Statutes, additional statutes were passed relating to the registry and returns of births, marriages and deaths; Sts. 1842, c. 95; 1844, c. 159; 1849, c. 202; 1850, c. 121; and in the Gen. Sts. c. 21, these provisions were incorporated with other new provisions, among which was § 6; and the facts required by law to be recorded

are definitely specified in the first section of that chapter. The argument is, that *c. 21, § 6*, has no application to this case, because not in existence when this record was made, and that it relates to a system of registration in part established after this marriage was celebrated, and that the section is not retrospective. But, apart from this, the record would be evidence of the facts required by law to be recorded, and these provisions of statute in this respect are but declaratory of the common law. *Kennedy v. Doyle, ubi supra. Sumner v. Sebec*, 3 Greenl. 223. One of the facts required by the Rev. Sts. *c. 75*, to be recorded, was the "places of residence" of the parties.

The question remains whether an attested copy of the record is evidence of the "places of residence," as the Rev. Sts. *c. 75, § 25*, makes "a copy of any such record duly certified" presumptive evidence of the fact of marriage, but of nothing else. In *Stetson v. Gulliver*, 2 Cush. 494, 498, Chief Justice Shaw, in reference to a registry copy of a deed, says, "In this State, we think, it has always been held, that when the book of the register would be evidence, a certified copy is entitled to have the same effect; there being very little ground to apprehend any mistake from that cause, and upon consideration of the great public inconvenience, which would result from having the books of record removed from their proper custody and place of security." This rule of evidence has, we think, been applied to all cases of records required by law to be kept by a public officer. 2 Dane Ab. 296. *Commonwealth v. Chase*, 6 Cush. 248. *Chamberlin v. Ball*, 15 Gray, 352. *Commonwealth v. Norcross*, 9 Mass. 492. *Kennedy v. Doyle, ubi supra. Oakes v. Hill*, 14 Pick. 442. *Robbins v. Townsend*, 20 Pick. 345. *Barnard v. Crosby*, 6 Allen, 327.

We are inclined also to the opinion, that the Gen. Sts. *c. 21, § 6*, being but declaratory of the common law of this Commonwealth, was intended to be retrospective, and to apply to all records, whether past or future, of all facts required at the time of the record by law to be recorded relative to any birth, marriage or death. The ruling of the court was therefore correct. The ruling of the court upon the effect of John Beals having been an alien when he died, was correct. *Worcester v. Springfield, ubi supra.*
Exceptions overruled.

FIRST NATIONAL BANK OF PETERBOROUGH *vs.* HENRY
CHILDS & others.

Franklin. Sept. 20. — 28, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

Interest received by a national bank upon a promissory note, greater than the rate allowed by the laws of the State where the note was made, in violation of the U. S. Rev. Sts. § 5197, cannot be set off, in an action by the bank upon the note, against the amount due thereon; but the bank is entitled to recover only the face of the note, without interest.

CONTRACT on a promissory note for \$600. After the former decision, reported 130 Mass. 519, the case was submitted to the Superior Court, and, after judgment for the plaintiff for the face of the note without interest, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

A. De Wolf, for the plaintiff.

C. C. Conant, for the defendants.

DEVENS, J. The act of Congress to establish a national currency superseded the state laws on the subject of usury so far as they might otherwise be applicable to national banks. U. S. St. June 3, 1864, § 30. U. S. Rev. Sts. §§ 5197, 5198. *Central National Bank v. Pratt*, 115 Mass. 539. *Davis v. Randall*, 115 Mass. 547. The power vested in Congress to establish a bank and to authorize it to lend money, involves the power to fix the rate of interest it may take, and to prescribe the penalties for taking a greater rate. The rate of interest which under this legislation a national bank was entitled to charge upon loans, was that which was legal in the State, Territory or District where it was located. U. S. Rev. Sts. § 5197. The legal rate of interest in New Hampshire, where this bank is located and where the note in suit was made, is six per cent. Gen. Laws of N. H. of 1878, c. 232, §§ 2, 3. The loan upon which it is founded was originally made on August 31, 1868, for the sum of \$600, and a note for that amount was then given, signed by Amzi Childs, for whose benefit the transaction took place, and who paid the discount, and by Henry Childs, which note was renewed from time to time with the same signers, until November 17, 1871, when a note was given

by the original signers and also by Dexter Childs. The latter note was five times renewed, the note in suit, dated August 5, 1875, being the last of the series. The note given was always for the amount lent originally, but from August 31, 1868, to May 5, 1879, Amzi Childs paid either as discount or interest, when the notes became overdue, at the rate of $7\frac{3}{10}$ per cent. The sum thus paid and received amounted to \$140.40 on the notes signed by two of the defendants, and the additional sum of \$330.32 on the notes signed by all the defendants. These sums the defendants claim to offset and deduct from the note in suit, upon the ground that they are entitled so to do by the U. S. St. of June 3, 1864, § 30, and the U. S. Rev. Sta. § 5198, which states the penalty incurred by national banks accepting or stipulating for illegal interest. This section is as follows: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Under this statute, the defendants contend that the note in suit, being the last in a series of renewals of the original loan of August 31, 1868, is the same debt then contracted; that none of the notes could have borne interest, for the reason that their interest-bearing power was destroyed by the illegal agreement; and that the payments of discount or interest were in effect payments of the principal, and that they should now be deducted from the note in suit. Even if we treat the parties to the present suit as identical with those who were parties to the loan when it was originally made, and the note in suit as affected by all the transactions which have occurred since, whatever changes may have taken place in the form of the security, to this construction there appear to be obvious objections. It treats as payments on the principal those sums which were

distinctly paid for another purpose. It is not in the power of the defendants thus to change their application. Even if the receipt of them exposed the plaintiff to a penal action, had it been seasonably brought, it is not compelled to apply the moneys thus received to purposes not contemplated either by itself or the defendants when they were paid. *Rohan v. Hanson*, 11 Cush. 44. *Richardson v. Woodbury*, 12 Cush. 279. *Hubbell v. Flint*, 15 Gray, 550.

Again, it is sought to impose upon the plaintiff a penalty different from any prescribed by the statute of the United States. That nowhere provides for a forfeiture of the illegal interest actually paid by a deduction from the note or other security when sued. It does not even provide for a recovery of the same by action, although it exposes the party receiving the same to a penal action, the penalty in case of recovery being double the amount of illegal interest paid. Its effect, so far as the note in suit is concerned, is only to destroy its interest-bearing capacity, which may involve a loss greater or less than the illegal interest stipulated for or paid, according to circumstances.

Where a statute creates a new right or offence, and also specific remedies or penalties, they alone apply. Such provisions are exclusive. *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29.

There is, however, most respectable authority in the cases cited by the defendants for the position assumed by them. In *Overholt v. Mt. Pleasant National Bank*, 82 Penn. St. 490, it was held that, in an action by a national bank to recover the amount of a note, which was given in renewal of other notes, the defendant is entitled, where illegal interest has been exacted, to credit for all the interest he has paid from the beginning on the loan, and not merely to the excess above the lawful rate. See also *Lucas v. Government National Bank*, 78 Penn. St. 228; *Cake v. Lebanon National Bank*, 86 Penn. St. 303; *Brown v. Erie National Bank*, 72 Penn. St. 209; *Shunk v. Galion National Bank*, 22 Ohio St. 508; *Stephens v. Monongahela National Bank*, 88 Penn. St. 157; *In re Wild*, 11 Blatch. C. C. 243; *Auburn National Bank v. Lewis*, 75 N. Y. 516.

On the other hand, in *Barnet v. National Bank*, 98 U. S. 555, it was held that, where illegal interest has been paid upon the

discount of negotiable paper, it cannot, in an action upon such paper, be applied by way of set-off or payment, nor can double the amount of such interest be allowed by way of counter-claim, but the party is restricted to his legal remedy by an independent action. This construction by the Supreme Court of the United States of a law passed by Congress under its constitutional authority, must be deemed authoritative. *Scribner v. Fisher*, 2 Gray, 43. *Potter v. Irish*, 10 Gray, 416. *Johnson v. Merrill*, 122 Mass. 153. The decisions above cited were made before it was announced. It is accepted as final upon this point by the Supreme Court of Pennsylvania in *Clarion National Bank v. Gruber*, 91 Penn. St. 377. In that case, the court below had ruled that there could be a recovery for such moneys as were paid by the plaintiff as interest or discount where such moneys so paid were in excess of six per cent, which was apparently the lawful interest. Mr. Justice Gordon, in giving the opinion of the Supreme Court of Pennsylvania, says very frankly, "By a recent decision of the Supreme Court of the United States, this would seem to be error, but it is an error of this court rather than of the court below, for our decisions in *Lucas v. Bank*, 78 Penn. St. 228, and kindred cases, were followed." After stating the facts in *Barnet v. National Bank*, *ubi supra*, he adds, "From this it appears that neither by set-off nor original action can interest, over legal rate, paid to a national bank, be recovered except by way of penalty, as prescribed by act of Congress of June 3, 1864." See also *Fayette County National Bank v. Dushane*, 96 Penn. St. 340. The same effect is also given to this decision of the Supreme Court of the United States by the Court of Appeals of New York in *Auburn National Bank v. Lewis*, 81 N. Y. 15.

While the defendants upon proper proofs were entitled to recover double the amount of the illegal interest paid by them, they could only do so by resorting to a suit brought specially for that purpose within the time limited by law. The right to avail themselves of such payments in set-off was not given by statute, and the deductions claimed by them cannot be made.

There remains the single inquiry whether the plaintiff is entitled to any interest upon the note now in suit. This the plaintiff claims at least from the date of the writ. It is found that the sum of \$11.16 was the amount of illegal discount paid upon

the note in suit. Discount is interest either paid in advance or reserved in the note. As the note continued always for the same amount, this sum was therefore paid in advance. In *Barnet v. National Bank*, *ubi supra*, Mr. Justice Swayne, in analyzing section 5198 of the U. S. Rev. Sts. says: "Two categories are thus defined and the consequences denounced: 1. Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered. 2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank, brought by the persons paying the same or their legal representatives."

The effect of the first clause seems to us inadvertently stated by the learned judge in this, that it fails to include all the contingencies provided for by that clause, which applies the forfeiture of interest upon the note or other security, not merely where illegal interest has been stipulated for but not paid, but also where it has been knowingly taken, received or reserved. This analysis is used by Mr. Justice Swayne argumentatively, and does not affect the points decided by the case or involved in the judgment of the court, which determines only two questions: first, that payments of usurious interest cannot be applied in offset or payment to the bill of exchange in suit; and, second, that a claim to recover double the amount of illegal interest, paid by way of counter-claim in the pending suit on the bill, cannot be maintained. The category provided for by the first clause of the section is here found to exist, because it is found that illegal interest was knowingly paid to the amount of \$11.16 on the note in suit. The forfeiture of the interest which the note carries with it, or which has been stipulated to be paid thereon, is attached to the instrument itself. It may be insisted upon by way of defence to the note whenever it is sued. Nor is it so limited that it must be set up within two years, although the penal action provided for by the second clause of the section must be brought within that time. *Peterborough National Bank v. Childs*, 130 Mass. 519. As the note can be made the foundation only of a judgment which does not include interest upon it, had the illegal interest of \$11.16 been reserved from the note instead of having been paid upon it, the note would have carried

that interest with it, and that sum would have been forfeited, as well as all other sums of interest which might have accrued. *Auburn National Bank v. Lewis, ubi supra.* Where such payment is made in advance, the interest-bearing quality of the note is equally destroyed, although there cannot be a deduction of the illegal interest paid by way of offset. The judgment in this case for the face of the note, without interest, was therefore correct.

Judgment affirmed.

HENRY CHILDS vs. NEW HAVEN & NORTHAMPTON COMPANY.

Franklin. Sept. 20. — 28, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

It is not necessary that the adjudication of county commissioners, upon the subject-matter of a petition presented by a person whose land has been taken for a railroad location, should be annexed to or made a part of the warrant for a jury subsequently issued by the commissioners, if a copy of the original petition is incorporated with the warrant.

An objection to the method adopted by a sheriff in empanelling a jury to assess the damages sustained by a person by the taking of his land for a railroad location, cannot be considered by this court, if the facts stated in the objection are not sustained by the certificate of the sheriff.

At the trial of a petition before a sheriff's jury, for an assessment of damages sustained by the petitioner by the taking of a portion of his land for a railroad location, it appeared that there was upon the petitioner's remaining land chestnut timber suitable for ties. The respondent offered evidence that there would be a greater demand for chestnut ties in the vicinity by reason of the construction of the railroad; and also offered evidence "of a convenient place of delivery at a new depot of said railroad." There was evidence of a station of another railroad more accessible from the petitioner's woodland by the distance of one third of a mile. The evidence offered was rejected. *Held*, that the respondent had no ground of exception.

PETITION to the county commissioners for a sheriff's jury, to assess the damages sustained by the taking by the respondent of the petitioner's land in Deerfield for a railroad location. The jury awarded the petitioner a certain sum, which verdict was accepted, and confirmed by the Superior Court; and the respondent appealed to this court. The facts appear in the opinion.

C. Delano & J. A. Aiken, for the respondent.

G. D. Williams, for the petitioner.

DEVENS, J. 1. The only objection to the record now insisted on is that the warrant for a jury did not have annexed to or made a part of it the adjudication of the county commissioners on that portion of the original petition which prayed that the respondent might be ordered to construct and maintain an opening through the embankment constructed on the petitioner's land, in such manner that the petitioner would be enabled thereby to have more convenient access to the portions of his land situated upon the easterly side thereof. We do not consider this to have been necessary. The warrant sufficiently set forth the subject matter of the inquiry by having incorporated with it a copy of the original petition, which informed the jury of the matter to be tried. Pub. Sts. c. 49, § 38. *Walker v. Boston & Maine Railroad*, 3 Cush. 1, 15. It is true that the manner in which the respondent was to cross the petitioner's land, and whether it was to be required to maintain what is familiarly termed a "farm crossing," were not subjects of revision by the jury. These had been finally determined by the commissioners. Pub. Sts. c. 112, § 138. But while the convenience or inconvenience of the manner in which the respondent was permitted to cross the petitioner's land was important in ascertaining the damages to be assessed in his favor, it was matter of evidence only. Upon this subject the adjudication of the commissioners was competent to be submitted by either party. In *White v. Boston & Providence Railroad*, 6 Cush. 420, and *Dwight v. County Commissioners*, 11 Cush. 201, cited by the respondent, which were petitions heard before sheriff's juries for the assessment of damages caused by the laying out of highways, the records of the proceedings of the commissioners, and their adjudications showing the establishment, direction, course and extent of the ways as located by them, were admitted in evidence, but an examination of the cases shows that they did not form a part of the warrants, nor were they annexed thereto.

2. The objection that there was error on the part of the sheriff in the method taken by him to secure the empanelling of the jury, cannot be considered. The respondent objected that "one Elijah W. Smith, one of the jurors summoned to try the matter of said petition, having declined to serve, one Ansel A. Rankin, a person residing and being in Greenfield, was sent

for and substituted in place of said Smith on the jury." This objection was made before any evidence was introduced, but it nowhere appears that the facts existed as they are stated therein. These should have been shown by the certificate of the sheriff. They are not to be treated as proved because the objecting party asserts them. The importance of this rule is well illustrated in the present case by an examination of the return of the sheriff, which states the facts as to this matter quite differently in some important particulars. A bill of exceptions which recites only the rulings requested and those given, without stating the facts proved or the evidence introduced, cannot be sustained. *Canfield v. Canfield*, 112 Mass. 233. *Kutredge v. Russell*, 114 Mass. 67.

3. The benefit sought to be set off, where an application is made for damages, is such that it must be peculiar to the land taken, by reason of its actual improvement or advancement in value, as distinguished from those anticipated advantages which it is to share only in common with the lands of other citizens situated in the vicinity, such as would be derived from the increase, actual or prospective, in business activity and the general prosperity of a community. The latter are too contingent, indirect and remote to be brought into consideration in settling the question of damages to the petitioner for taking his particular parcel of land. *Meacham v. Fitchburg Railroad*, 4 Cush. 291. *Upton v. South Reading Branch Railroad*, 8 Cush. 600. *Dickenson v. Fitchburg*, 13 Gray, 546. In this view, the evidence that there would be a greater demand for chestnut ties in the vicinity by reason of the construction of the railroad was properly rejected, although it appeared that there was upon the petitioner's lot chestnut timber suitable for ties. Nor is it shown that the evidence "of a convenient place of delivery at a new depot of said railroad" was improperly rejected, or that the advantage that the petitioner could have or expect therefrom was in any way special, peculiar, or different from that which the whole community in that locality would derive from the construction of this public work. It is true that in *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115, evidence of the location of a passenger station in the immediate vicinity of the land taken was held admissible. The certificate in the present case does not

show how near to the land taken the station of the respondent was to be. It is perhaps fairly to be inferred, from the fact that there was evidence of a station "of another railroad more accessible from the petitioner's woodland by the distance of one third of a mile," that it was not in its immediate vicinity. Certainly, the offer of the respondent does not show that, as located, it could have been of any special or peculiar benefit to the petitioner.

Judgment affirmed.

S. W. LONGLEY *vs.* TRUMAN CLEAVLAND.

Hampshire. Sept. 20, 1881. — Sept. 7, 1882. LORD, DEVENS & C. ALLEN, JJ., absent.

If a magistrate, before whom a hearing, upon the application of a person to take the oath for the relief of poor debtors, is appointed, adjudges the creditor in default upon his failure to appear, he has no further jurisdiction except to discharge the debtor, and cannot proceed to administer the oath and to render a judgment upon charges of fraud filed against the debtor, under the Gen. Sts. c. 124, § 31; and no appeal lies to the Superior Court by the creditor from such judgment.

CHARGES OF FRAUD, filed under the Gen. Sts. c. 124, § 31, upon the defendant's application to be admitted to take the oath for the relief of poor debtors. At the trial in the Superior Court, before *Dewey, J.*, the jury returned a verdict of guilty on the first charge, and not guilty on the second charge; and the defendant alleged exceptions. The facts appear in the opinion.

S. S. Taft, for the defendant.

W. G. Bassett, for the plaintiff.

FIELD, J. It appears by the record of the magistrate, that Truman Cleavland, the debtor, entered into a recognizance with sureties for his appearance on June 7, 1879, at nine o'clock in the forenoon, at the office of the magistrate in Enfield; and that due notice was served on the creditor that the debtor desired to take the oath for the relief of poor debtors at that time and place, "at which time the said Truman Cleavland appeared and was in attendance a full hour, at the expiration of which hour the said Longley, not appearing, was declared in default; before the oath was administered to said Cleavland, Longley came into

court and requested that the default should be taken off, but it was decided adversely, and the oath for the relief of poor debtors was duly administered to said Cleavland, and the said Cleavland by reason of such default of prosecution adjudged not guilty of the charges of fraud, from which decision the said S. W. Longley appeals to the Superior Court," &c.

In the Superior Court, "the defendant moved to dismiss the appeal, because it appears by the record of the magistrate that no hearing had been had on said charges of fraud before him, and because no appeal lies from the judgment of the magistrate in this case under the provisions of the statute, which was refused."

The Gen. Sts. c. 124, § 48, provide, among other things, that "if the plaintiff or creditor, or some one in their behalf, shall not attend the examination, the defendant or debtor shall, without examination and without payment of any fees, be discharged from arrest or imprisonment, and shall be forever exempt from arrest on the same execution or any process founded on the judgment; and a certificate of such discharge under the hand of the magistrate shall be annexed to the writ or execution," &c.

This contemplates a discharge without an examination, and without the administration of the oath, pursuant to §§ 21, 22. A failure to appear by the creditor or his attorney, or by some one in his behalf, would be a discontinuance of the proceedings. *Phelps v. Davis*, 6 Allen, 287. It must be considered an abandonment of the charges, and of all opposition to the discharge of the debtor. *O'Connell v. Hovey*, 126 Mass. 310.

When charges of fraud are made, "the charges shall be considered in the nature of a suit at law, to which the defendant or debtor may plead that he is guilty or not guilty, and the magistrate may thereupon hear and determine the same." § 31. By § 32, "when the hearing is had on the charges of fraud mentioned in the preceding section, and judgment is rendered thereon by the magistrate, either party may appeal to the Superior Court, in like manner as from the judgment of a justice of the peace in civil actions," &c.

This in terms gives an appeal only when a hearing is had and judgment is rendered on the charges of fraud, and such we think is the intention of the statute.

show how near to the land taken the station of the respondent was to be. It is perhaps fairly to be inferred, from the fact that there was evidence of a station "of another railroad more accessible from the petitioner's woodland by the distance of one third of a mile," that it was not in its immediate vicinity. Certainly, the offer of the respondent does not show that, as located, it could have been of any special or peculiar benefit to the petitioner.

Judgment affirmed.

S. W. LONGLEY *vs.* TRUMAN CLEAVLAND.

Hampshire. Sept. 20, 1881. — Sept. 7, 1882. LORD, DEVENS & C. ALLEN, JJ., absent.

If a magistrate, before whom a hearing, upon the application of a person to take the oath for the relief of poor debtors, is appointed, adjudges the creditor in default upon his failure to appear, he has no further jurisdiction except to discharge the debtor, and cannot proceed to administer the oath and to render a judgment upon charges of fraud filed against the debtor, under the Gen. Sts. c. 124, § 31; and no appeal lies to the Superior Court by the creditor from such judgment.

CHARGES OF FRAUD, filed under the Gen. Sts. c. 124, § 31, upon the defendant's application to be admitted to take the oath for the relief of poor debtors. At the trial in the Superior Court, before *Dewey, J.*, the jury returned a verdict of guilty on the first charge, and not guilty on the second charge; and the defendant alleged exceptions. The facts appear in the opinion.

S. S. Taft, for the defendant.

W. G. Bassett, for the plaintiff.

FIELD, J. It appears by the record of the magistrate, that Truman Cleavland, the debtor, entered into a recognizance with sureties for his appearance on June 7, 1879, at nine o'clock in the forenoon, at the office of the magistrate in Enfield; and that due notice was served on the creditor that the debtor desired to take the oath for the relief of poor debtors at that time and place, "at which time the said Truman Cleavland appeared and was in attendance a full hour, at the expiration of which hour the said Longley, not appearing, was declared in default; before the oath was administered to said Cleavland, Longley came into

court and requested that the default should be taken off but it was decided adversely, and the oath for the relief of poor debtors was duly administered to said Cleavland, and the said Cleavland by reason of such default of prosecution adjudged not guilty of the charges of fraud, from which decision the said S. W. Longley appeals to the Superior Court," &c.

In the Superior Court, "the defendant moved to dismiss the appeal, because it appears by the record of the magistrate that no hearing had been had on said charges of fraud before him, and because no appeal lies from the judgment of the magistrate in this case under the provisions of the statute, which was refused."

The Gen. Sts. c. 124, § 48, provide, among other things, that "if the plaintiff or creditor, or some one in their behalf, shall not attend the examination, the defendant or debtor shall, without examination and without payment of any fees, be discharged from arrest or imprisonment, and shall be forever exempt from arrest on the same execution or any process founded on the judgment; and a certificate of such discharge under the hand of the magistrate shall be annexed to the writ or execution," &c.

This contemplates a discharge without an examination, and without the administration of the oath, pursuant to §§ 21, 22. A failure to appear by the creditor or his attorney, or by some one in his behalf, would be a discontinuance of the proceedings. *Phelps v. Davis*, 6 Allen, 287. It must be considered an abandonment of the charges, and of all opposition to the discharge of the debtor. *O'Connell v. Hovey*, 126 Mass. 310.

When charges of fraud are made, "the charges shall be considered in the nature of a suit at law, to which the defendant or debtor may plead that he is guilty or not guilty, and the magistrate may thereupon hear and determine the same." § 51. By § 32, "when the hearing is had on the charges of fraud mentioned in the preceding section, and judgment is rendered thereon by the magistrate, either party may appeal to the Superior Court, in like manner as from the judgment of a justice of the peace in civil actions," &c.

This in terms gives an appeal from the judgment of the magistrate, when judgment is rendered on the charges of fraud, and it is the intention of the statute.

The right to appeal from a judgment of nonsuit rendered by a justice of the peace in a civil action rests upon the peculiar provisions of statute. *Ball v. Burke*, 11 Cush. 80. *Holman v. Sigourney*, 11 Met. 436. Gen. Sts. c. 120, § 25.

If the creditor fails to appear, neither an examination of the debtor in regard to his property nor a hearing on the charges of fraud is had, and no judgment of the magistrate that the debtor is or is not entitled to take the oath, or that he is or is not guilty of the charges of fraud, is rendered, but the debtor is discharged from arrest or imprisonment, because the creditor has not attended and has abandoned the proceedings.

The proceedings of the magistrate after the expiration of the hour, and after adjudging that the creditor was in default, in administering the oath and adjudging the debtor not guilty of the charges by reason of such default, were irregular and unauthorized, but cannot prejudice the debtor. After the hour had elapsed and the plaintiff had been adjudged in default for not appearing, the magistrate had no jurisdiction except to discharge the debtor, and could not enter a judgment on the charges of fraud. *Sweetser v. Eaton*, 14 Allen, 157.

Exceptions sustained.

LEWIS L. DRAPER vs. MARY J. BUGGEE.

Hampshire. Oct. 5, 1881; May 6. — Sept. 7, 1882. LORD, J., absent.

If a wife pays, with money earned by her own labor, since the St. of 1874, c. 184, a promissory note made by her husband and the principal and interest of a mortgage on land owned by him, a conveyance of the land by him to her through a third person, made in connection with such payments, is not in fraud of his creditors.

WRIT OF ENTRY to recover a parcel of land in Easthampton. Plea, *nul disseisin*. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The demandant claimed title under an execution deed, dated October 4, 1880, based upon a judgment against one Robert Buggee, husband of the tenant. There was evidence tending to show that the premises were conveyed to Buggee in 1864;

that Buggee the same year mortgaged said premises to one Sawyer, for \$300; that in 1865 Buggee mortgaged said premises to the Easthampton Rubber Thread Company, for \$650, for the purpose of using part of the proceeds for the payment of the Sawyer mortgage, which mortgage was discharged; that in 1868 Buggee mortgaged said premises to the Northampton Institution for Savings, for \$400, and used the proceeds to take up the mortgage to the Easthampton Rubber Thread Company, which had been reduced by the tenant, by the payment of money earned by her, to about \$400; and that Buggee mortgaged said premises to one Dawson, in 1871, for \$400, and made another mortgage to Dawson in 1873, for \$300.

The tenant claimed title from her husband through a daughter, who, it was agreed, was a mere conduit through which to convey title to the tenant, by deeds dated January 31, 1879; and it was agreed that no consideration in money was paid when either of said deeds was made. There was evidence tending to show that the tenant had worked in the mills at Easthampton eighteen years; that from her earnings she had supported her husband and family, and from said earnings she had paid the interest due on said mortgages, and part of the principal secured by them, prior to January 31, 1879; that her husband had contributed nothing towards the support of his family, or towards the liquidation of said mortgages; that her husband gave up the idea of paying for the place in 1864, soon after the lot was bought and before anything had been paid on account of it, and abandoned her for several months; that she then agreed with the mortgagee of the property to pay from her earnings monthly instalments and assume the mortgage, and did so pay a part of the mortgage and prevent its foreclosure, and paid all that was ever paid on account of principal or interest towards the cost of the place, amounting to a considerable sum; that she also assumed and agreed to pay, as hereinafter stated, and did pay, one note of her husband of \$50, and all the principal sums and interest secured by the Dawson and Northampton Bank mortgages; and that this arrangement was made in connection with her husband's conveyance to her. There was no evidence that the sums paid by the tenant for the support of her husband and family, and upon the mortgages aforesaid, were expected to be paid back

to her by her husband, nor that said sums were to be treated as a loan to the husband.

It also appeared in evidence, that in the year 1877 Buggee borrowed of the Easthampton Savings Bank the sum of \$50, giving his note with an indorser; that a short time before the deed to the tenant, dated January 31, 1879, at the request of the indorser, Samuel T. Seelye in behalf of said bank pressed Buggee for payment of the note, whereupon the tenant went to see Seelye, and proposed to pay the note herself; that Seelye advised her not to pay the note unless her husband would give her a deed of the property in question; that she sent him to Seelye, who persuaded him to give a deed of said property to the tenant. Seelye also testified that he told the husband that, if he gave a deed to his wife, he would give the money to take up the mortgages of Dawson and the Northampton Institution for Savings. The tenant mortgaged said premises to the Easthampton Savings Bank on May 27, 1880, for \$1000, the proceeds of which, together with the tenant's earnings, were used for the payment of said mortgages, which were discharged. There was evidence tending to show that the premises were fairly worth from \$1200 to \$1500 on January 31, 1879, when said premises were conveyed to the tenant.

The demandant contended that the conveyance made to his wife by Robert Buggee was for the purpose of avoiding the attachment of the same by his creditors; that there was no consideration for said conveyance, and that no price was paid for it; and that the wife participated in the fraudulent purpose of the husband.

The judge, upon the subject of conveyances in fraud of creditors, gave full instructions, which were not objected to, excepting as to matter of consideration; but the judge refused to give the following instructions, asked for by the demandant's counsel, in the form in which they were presented. The modifications and qualifications made by the judge in the instructions are hereinafter stated. The tenant contended that her labor and earnings had virtually purchased this estate; that practically she had been the person who had bought the estate and had built it up, and made a home for her husband and family, and that, although no money was paid when she took the conveyance, there

was a just and legal consideration in the fact that the estate had been practically the result of her labor. The judge ruled that, if that was the fact, it would explain and tend to show that the want of a cash consideration for the conveyance was only one way of adjusting, as between the husband and wife, just and equitable rights arising from the fact, which he recognized, that she had really been the earner of the estate, and then that would be a consideration which would be relieved from fraud; that the husband had no right to give away his estate to his wife as against the rights of his creditors; that he could not rule that the husband could not restore to the wife an estate the substantial property of which was in her, while the nominal record title was in him; and that if the jury should be satisfied that the considerations which led to the conveyance were of that moral nature, and that the wife, in taking the conveyance, did not know, and had no reason to know, that her husband had a fraudulent purpose, the conveyance would be valid to her. To the foregoing instruction no specific objection was made, excepting so far as such a specific objection is implied in the instructions asked for by the demandant, and refused.

The demandant asked the judge to give the following instructions: "The payments of money by the tenant, out of her own earnings, upon the mortgage debts upon the property previous to the conveyance, is not a sufficient consideration for the conveyance of the property to the tenant by the husband. The payment by the tenant, out of her own earnings, of the debt of her husband of \$50 to the Easthampton Savings Bank, is not a sufficient consideration to support the transfer by the husband to her of the property of the value that this property was."

The judge gave the following instructions: "The payment of money by the tenant, out of her own earnings, upon the mortgage debt upon the property previous to the conveyance, is not in and of itself a sufficient consideration for the conveyance of the property to the tenant by the husband; but the fact of such payments, and that they induced the parties to make the conveyance, may be considered as tending to repel an inference of fraud towards creditors arising from the fact that there was no money paid in consideration of the conveyance, and as tending to show that the conveyance was a reality, and not a sham.

The payment by the tenant, out of her own earnings, of the debt of the husband of \$50 to the Easthampton Savings Bank, is not in and of itself a sufficient consideration to support the transfer by the husband to her of the property of the value that this property was, because in fact no payment of that sum or any other sum by the wife to her husband, or in his interest or in improving his estate, would constitute such a consideration; but such payment might be considered as tending to repel an inference of fraud towards creditors arising from the fact that no money was paid in consideration of the conveyance, and also may be considered as tending to show that the conveyance was a reality, and not a sham."

The jury returned a verdict for the tenant; and the demandant alleged exceptions.

D. W. Bond & J. B. Bottum, for the demandant.

W. G. Bassett, for the tenant.

FIELD, J. Whatever may be the law in regard to voluntary conveyances to others, a conveyance made on the meritorious consideration of blood or affection to a child, or as a settlement to a wife, is not *per se* fraudulent and void as to existing creditors. Whether it is so depends upon the circumstances of the case and the actual or presumed intent of the grantor. *Winchester v. Charter*, 12 Allen, 606, and 102 Mass. 272. *Lerow v. Wilmarth*, 9 Allen, 382. *Thacher v. Phinney*, 7 Allen, 146.

A conveyance made by a husband through a third person to a wife, on a consideration of money received from the wife, which, but for the relation of husband and wife, would be a valuable consideration, in law is not, as against creditors, regarded as a voluntary conveyance. *Atlantic National Bank v. Tavener*, 130 Mass. 407. *Bancroft v. Curtis*, 108 Mass. 47. Whether such a conveyance can be avoided by a creditor for the fraud of the grantor, without showing a participation in that fraud by the grantee, need not be decided in this case.

Since the passage of the St. of 1874, c. 184, the money received by the wife, in this case, for her labor in the mill, must be regarded as her separate property, and the payment by her therefrom of her husband's note for \$50, and of the principal and interest of his debts secured by mortgages upon the property, but for the relation of husband and wife, would have been a

valuable consideration in law for the conveyance. These sums she paid in pursuance of the arrangements "made in connection with her husband's conveyance to her." The effect of the previous payments by her on account of the mortgage, we do not consider. The conveyance cannot be regarded as voluntary.

The exceptions do not show that the demandant was an existing creditor at the time this conveyance was made, or whether any debts of the husband existed except those which the wife agreed to pay, and did pay, out of her separate property. The circumstances attending the conveyance were not such that the law necessarily implies fraud.

It is not plain what questions of law are raised by these exceptions. It is said: "The judge, upon the subject of conveyances in fraud of creditors, gave full instructions, which were not objected to, excepting as to matter of consideration; but the judge refused to give the following instructions, asked for by the demandant's counsel, in the form in which they were presented. The modifications and qualifications made by the judge in the instructions are hereinafter stated." Then follow a statement of what the tenant claimed and a ruling of the court, and it is said, "To the foregoing instruction no specific objection was made, excepting so far as such a specific objection is implied in the instructions asked for by the demandant, and refused." The instructions asked for were, in effect, that the payment of the money upon the mortgages made by the tenant before the conveyance to her, out of her earnings, was not a sufficient consideration for the conveyance, and that the payment of the husband's note for \$50 out of her earnings was not a sufficient consideration "to support the transfer by the husband to her of the property of the value that this property was." The court gave the instruction, that such payments were not, in and of themselves, a sufficient consideration for the conveyance, or to support the transfer by the husband to her of property of the value that this property was, "because in fact no payment of that sum or any other sum by the wife to her husband, or in his interest or in improving his estate, would constitute such a consideration." "But the fact of such payments, and that they induced the parties to make the conveyance, may be considered as tending to repel an inference of fraud towards creditors arising from the

fact that there was no money paid in consideration of the conveyance," and also may be considered "as tending to show that the conveyance was a reality, and not a sham." These facts were certainly competent on the question of a fraudulent intent on the part of the husband in making the conveyance, and the ruling of the court, that the conveyance could not be regarded as made upon a sufficient consideration, was certainly favorable enough to the demandant.

There is a clause in one of the instructions of the court to which no exception was taken, which, taken alone, might be construed to mean that this conveyance, even if made on considerations of a moral nature such as are therein described, would be valid as against a creditor, if the wife "did not know, and had no reason to know, that her husband had a fraudulent purpose;" but the whole of the instructions upon the subject of conveyances in fraud of creditors is not set out, and as no exception was taken to this, and it was not noticed in the argument or brief of the demandant's counsel, it cannot be considered.

The case has been put by the demandant's counsel in argument solely on the ground that the conveyance was voluntary, and fraudulent in law as to existing creditors.

Exceptions overruled.

AHIAL PUTNAM vs. A. H. G. LEWIS.

Hampden. Sept. 27, 1881. — Sept. 7, 1882. LORD, DEVENS & C. ALLEN, JJ., absent.

The entering upon land and cutting timber by the agent of a person, under a claim of right, operates to put the latter into possession of such timber as is severed, and gives him sufficient title to maintain an action for the conversion of the timber as against a person having no right in it.

A declaration, alleging an interference with the plaintiff's right to cut and remove standing timber, is not sustained by proof that he had the seisin or the possession of the timber, without proof that he had the right to cut and remove it.

In an action for interfering with the plaintiff's right to cut timber, which right he was exercising in good faith and under claim of title under a deed, the defendant may show that the plaintiff's grantor had, previously to the deed to the plaintiff, conveyed all his right in said land, although the defendant does not claim under the last-named deed.

TORT, in three counts, against a deputy sheriff. Writ dated March 4, 1878. The first count was for the conversion of a quantity of logs and pine lumber.

The second count alleged that the plaintiff was seised of a large number of trees standing and growing upon the farm of one Webster, in the town of Tolland, known as the Gilmore farm; that the plaintiff's estate in said trees was determinable upon his failure to cut and draw them off within five years from March 4, 1873; that while he was engaged in cutting and drawing them off, and was prepared and was intending to cut and draw all of them off within said five years, the defendant unlawfully interfered, and with force and arms hindered and prevented the plaintiff from cutting and drawing them off until after the expiration of said five years, whereby the plaintiff had been deprived of the use and enjoyment of his said trees, and had wholly lost the same.

The third count alleged that the plaintiff was in possession of a large number of pine timber logs and of a large number of growing trees standing upon the farm described in the second count, with the right to enter upon said farm and cut and draw off all said trees and logs until March 4, 1878, and not after; that before that day, namely, on February 26, 1878, the defendant unlawfully, with force and arms, interfered with, hindered and prevented the plaintiff from entering, cutting and drawing off said logs and trees until after March 4, 1878, whereby the plaintiff wholly lost said logs and trees.

The answer contained a general denial; averred that the trees, lumber and logs were not the property of the plaintiff, but were the property of one James L. Van Wert, and that the defendant, by virtue of an execution against Van Wert, sold them as Van Wert's property; that if Van Wert had previously sold or conveyed said property, he did it in fraud of his creditors, and that the plaintiff participated in such fraud; and that the plaintiff could not have cut and removed the standing timber within said five years, even if the defendant had not interfered.

Trial in the Superior Court, without a jury, before *Gardner, J.*, who allowed two bills of exceptions, alleged by the plaintiff and the defendant respectively, which set forth the facts and the rulings of the judge in substance as follows:

On March 4, 1873, Van Wert, who then owned the Gilmore farm, conveyed it by deed, duly acknowledged and recorded, to one Butler. Immediately following the description in the deed was this clause: "Reserving to myself, my heirs and assigns, all the timber and wood and trees now on the farm, with the right to enter said premises, and draw off the same at all times of the year for the space of five years from the date of the deed."

On October 4, 1873, Van Wert executed an instrument under seal, which set forth that he "bargained, sold and delivered" to Ellen M. Putnam "all the timber, logs and trees on the Gilmore place, so called, reserved by me when deeding the same."

On May 10, 1875, Ellen M. Putnam executed an instrument under seal to the plaintiff of the same property, the words of conveyance being "do sell, bargain, convey and deliver."

These instruments were first acknowledged, and recorded in the registry of deeds, on February 12, 1878.

The plaintiff also put in evidence a quitclaim deed, in common form, dated February 14, 1878, from Van Wert to the plaintiff, of the same property, which deed was expressed to be "made to perfect the said Ahial Putnam's title to the property herein conveyed."

The plaintiff took the instrument from Ellen M. Putnam on April 1, 1876, in good faith, for a valuable consideration, and in the belief that he thereby acquired good title to the timber described in it, and the right to cut and appropriate the same. Under color of such title, and under a claim of such right, he shortly afterwards directed her to cut and remove all of such timber for him, and she undertook to do so as his agent. In pursuance of this undertaking, about February 1, 1878, she sent Van Wert, then in her employ, in charge of a force of workmen, upon the Gilmore farm, to cut and remove all the timber then standing thereon, and he engaged in that work.

Webster, the owner of the Gilmore farm, having in 1877 given a mortgage of the farm, without any mention of a reservation of the timber, an assignee of said mortgage filed a bill in equity in the Supreme Judicial Court, on February 7, 1878, praying for a perpetual injunction to restrain Webster, Van Wert and this plaintiff from cutting the timber therefrom. In that cause, a final decree was entered, February 14, 1878, perpetually

enjoining Webster, as prayed, but dismissing the bill as against this plaintiff and Van Wert.

On February 27, 1878, while Van Wert and his workmen were engaged in cutting and removing the timber from the Gilmore farm, and while much of it remained uncut, the defendant, by virtue of an execution in his hands against Van Wert, levied on the timber then uncut, as well as that which had been severed, as an officer forbade Van Wert to touch or cut the timber, and told him, if he cut any timber, he (the officer) would take him off to Springfield. Van Wert stopped cutting or removing any of the timber until March 4, 1878, the expiration of the term limited for its removal, and on March 20, 1878, the officer sold all the property so levied upon, as the property of Van Wert. At the time of these acts of the defendant, and for a long time before, Webster was in the occupation and possession of his farm, upon which the trees and lumber in question were, and knew that the timber was being cut off, as herein stated; but from the date of said decree of the Supreme Judicial Court, neither Webster nor any other party than the defendant, so far as appeared at the trial, was questioning the plaintiff's title to the timber, or hindering or proposing to hinder him from cutting and removing it. And it appeared that the plaintiff was prepared and was intending to cut and remove the whole of it within said five years, and would have done so but for the defendant's interference.

The plaintiff's seisin and possession of the timber on the Gilmore farm was such only as followed his paper title, as herein stated, and as his acts of ownership, exercised through his agents and servants, as herein stated, could give him.

The defendant put in evidence a quitclaim deed of the Gilmore farm, dated June 4, 1875, from Butler (the grantee in Van Wert's deed of March 4, 1873) to Ellen M. Putnam, containing no mention of a reservation of timber; also a quitclaim deed of the same, dated February 19, 1876, from Ellen M. Putnam to one Homer, likewise containing no mention of such a reservation, and sundry other mesne conveyances of the same down to Webster, all silent as to the timber. The defendant did not claim under any of these deeds, nor connect himself in any way with the title conveyed by them. Neither Homer nor

any one claiming under him had any knowledge of the instruments of conveyance from Van Wert and Ellen M. Putnam until the day they were recorded, when all the parties to said bill in equity had actual knowledge.

Upon the issue of fraudulent conveyance, the judge found for the plaintiff.

The plaintiff contended that the conveyances to him from Ellen M. Putnam and Van Wert gave him a title sufficient, as against the defendant, to entitle him to recover on all three of the counts in his declaration; and that, aside from such paper title, the acts of ownership done by him through his agents and servants, as herein stated, gave him such possession as entitled him to recover on all the counts; and asked the judge to rule, as matter of law, that, the plaintiff being in actual possession with a colorable title and under a claim of right, the defendant could not set up title in a third party without showing some claim, title, interest or authority in himself derived from such third party; and that the plaintiff's possession was a good title against all the world except those showing a better title.

The judge, having so ruled, then ruled that the plaintiff took no title by either of the conveyances of the timber to him, for the reason that before they took effect the grantors had parted with all their title; that any attempt by the plaintiff to cut and appropriate the timber, without the consent or permission of the persons authorized to give such consent or permission, would be an unlawful act, such as he could not authorize another to do for him; that any license given by Ellen M. Putnam was revoked by her deed to Homer, and that Webster could give no such license by reason of said decree of the Supreme Judicial Court; that the entering and cutting by the plaintiff's agents and servants, as herein stated, operated to put the plaintiff in possession of only such timber as they severed; that the plaintiff had no title to, nor possession of, the standing timber, and could not maintain his action on either the second or third counts; and found for the plaintiff on the first count only.

J. L. Rice, for the plaintiff.

A. M. Copeland, for the defendant.

W. ALLEN, J. The first count of the declaration is for the conversion of personal property of the plaintiff, and possession

under a claim of right by the plaintiff is sufficient title against one who has no right. The court correctly ruled that the entering upon the land and cutting the trees by the plaintiff's agents and servants, under a claim of right, operated to put the plaintiff into possession of such timber as they severed. 2 Greenl. Ev. § 637. *Shaw v. Kaler*, 106 Mass. 448. *Burke v. Savage*, 13 Allen, 408. The defendant justified only under Van Wert; but either the deed from him to Putnam, or the deed to the plaintiff, was sufficient to divest him of all right.

The other counts are not for an injury to land of which the plaintiff was seised or possessed, but for preventing him from exercising a right which it is alleged he had in the land. The second count alleges that the plaintiff was seised of standing timber, and that his estate therein was determinable upon his failure to do a certain act, namely, to cut and remove the trees within a limited time; and that the defendant by force prevented him from doing the act. The third count alleges the possession of the timber by the plaintiff, with the right to cut and remove it within the time limited, and that the defendant forcibly prevented the plaintiff from cutting and removing it. Neither count alleges an entry upon, or an injury to, the plaintiff's possession, but both allege an interference with the plaintiff's right to cut and remove the standing timber. To sustain these counts, it is not sufficient to prove that the plaintiff had the seisin or the possession of the trees, but he must show that he had the right to cut and remove them. He may have had seisin sufficient to maintain a writ of entry, or a possession sufficient to maintain trespass, without a right to sever the trees. These counts are not for a trespass upon, or injury to, the real estate of the plaintiff, but for special consequential damages alleged to have been caused by threats and force used to the plaintiff personally, whereby he was prevented from entering upon and enjoying a particular right he had in the trees; and they can be maintained only by proving that he had the right alleged. Actual possession under a claim of right, with the intention to cut the standing timber, even if sufficient to support an action of trespass against one violating that possession without right, would not be proof of, or equivalent to, a right to cut the timber. The evidence in the case does not show a trespass

upon the land or to the person, but only that the defendant, by asserting a right and by threats, prevented the plaintiff from cutting the trees standing on the land. Whether the action could be maintained by proof of such an interference with a right, need not be considered, as it is clear that the evidence did not show that the right existed.

The deed from Van Wert to Ellen M. Putnam conveyed to her all that had been reserved in the deed from him to Butler; the deed from Butler to Ellen M. Putnam conveyed to her all that had not been reserved in the deed to him from Van Wert. The two deeds gave to her the entire estate and interest in the land, and that passed to Homer by her deed to him. Her subsequent deed of the timber to the plaintiff conveyed nothing to him, because she had neither right nor seisin to convey, and any entry of the plaintiff under it, even if it amounted to a disseisin and gave him a possession which he could maintain against a stranger, gave him no substantive right to sever and remove the timber. *Slater v. Rawson*, 6 Met. 439. *White v. Foster*, 102 Mass. 375. *Lamb v. Pierce*, 113 Mass. 72. *Chester Emery Co. v. Lucas*, 112 Mass. 424. *Clap v. Draper*, 4 Mass. 266.

Exceptions of both parties overruled.

L. R. SPOONER vs. ANDREW J. MANCHESTER.

Worcester. Oct. 7, 1880; May 5, 1881. — Sept. 7, 1882. W. ALLEN & C. ALLEN, JJ., absent.

A person, who hires a horse of its owner to drive to a particular place, and in returning unintentionally takes the wrong road, and, after travelling on such road a few miles, discovers his mistake and takes what he considers the best way back to the place of hiring, which is by a circuit through another town, is not liable in trover for the conversion of the horse.

TORT. The declaration was as follows: "And the plaintiff says the defendant hired the plaintiff's horse and carriage to drive from Worcester to Clinton and back in a prudent, careful and proper manner, and that the defendant drove the same

beyond Clinton to Northborough wrongfully, and managed and drove said horse so improperly, unskilfully and wrongfully while at said Northborough, that said horse's ankle was broken and otherwise injured, to the great damage of the plaintiff." Answer, a general denial.

At the trial in the Superior Court, before *Dewey, J.*, without a jury, it appeared that, on a Sunday in January 1879, the defendant hired a horse of the plaintiff at Worcester to go to Clinton, a town situated twelve miles northerly from Worcester, and return on the evening of the same day; that the defendant drove the horse to Clinton over the road usually travelled between Worcester and Clinton; that he had never been over that road before; that he started with the horse to return from Clinton to Worcester over the same road about nine o'clock in the evening; that, after he had travelled a short distance from Clinton, he unintentionally took the usually travelled road from Clinton to Northborough, a town about ten miles southeasterly from Clinton and about ten miles easterly from Worcester, and not the direct road from Clinton to Worcester, and not on the road usually travelled between those places; that after proceeding five or six miles on said road from Clinton to Northborough beyond where said road diverged from the road to Worcester, he discovered that he was on the wrong road, although he had gone but a mile or two from Clinton before he first thought he was not on the road to Worcester; that, upon discovering that fact, he drove back on said road a short distance, and was informed that it would be the best way from that point to go through Northborough to Worcester; that he then turned round and started towards Worcester through Northborough; and that, when passing round a corner in Northborough, the horse became lame and disabled.

It did not appear that said injury was caused to the horse by any want of due care in the manner he was managing the same at the time of the injury, or that the defendant was not in the exercise of ordinary care when he lost his way.

Upon these facts, the plaintiff contended that he was entitled to recover for said injury to the horse; and the defendant asked the judge to rule that he was not liable for said injury.

The judge ruled the defendant was liable for said injury, and found for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar in October 1880, and was afterwards submitted on briefs.

W. S. B. Hopkins, for the defendant.

F. T. Blackmer, (*M. H. Cowden* with him,) for the plaintiff.

FIELD, J. This case apparently falls within the decision in *Hall v. Corcoran*, 107 Mass. 251, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when, after travelling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and, although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when, as in this case, the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney*, 117 Mass. 102.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him, by relation, as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes*, 102 Mass. 503, Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and the authorities are there cited. *Fouldes v. Willoughby*, 8 M. & W. 540, is a leading case, establishing the necessity, in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons v. Lillystone*, 8 Exch. 431; *Wilson v. McLaughlin*, 107 Mass. 587.

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: *Wheelock v. Wheelwright*, 5 Mass. 104. *Homer v. Thwing*, 3 Pick. 492. *Lucas v. Trumbull*, 15 Gray, 306. *Hall v. Corcoran*, *ubi supra*. In each of these cases, there was an intentional act of dominion

exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington v. Wentworth*, 8 Met. 548, a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season, with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

Parker v. Lombard, 100 Mass. 405, and *Loring v. Mulcahy*, 3 Allen, 575, were both decided upon the ground that the defendant neither assumed to dispose of the property as his own, nor intended to withhold the property from the plaintiff.

Nelson v. Whetmore, 1 Rich. 318, was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore v. Newton*, 9 Allen, 171, the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Fouldes v. Willoughby*, *ubi supra*. *Wilson v. McLaughlin*, *ubi*

supra. *Nelson v. Merriam*, 4 Pick. 249. *Houghton v. Butler*, 4 T. R. 364. *Heald v. Carey*, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester, a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.

Exceptions sustained.

FREDERICK A. POTTS *vs.* FRANK L. CHAPIN.

Worcester. Oct. 5, 1881. — Sept. 7, 1882. LORD, W. ALLEN & C. ALLEN, JJ., absent.

A declaration alleged that the defendant was the cashier of a bank at which E. did business; that at a certain date, and for a long time before, E. was indebted to various persons in large sums of money, and was insolvent; that the bank had for a long time and continuously discounted commercial paper for E.; that E. had not, for a long time prior to said date, "been able to meet his current obligations when due by payment, and had procured extensions by new discounts of his paper from time to time;" that E. during the same time was buying goods and selling them for less than their value, making drafts for their price, and procuring them to be discounted by the bank, through the hands of the defendant; that the defendant knew "the above-recited unusual, risky and deceptive manner in which E. was transacting his business, that he was of doubtful standing and responsibility, and was likely to fail, and was insolvent;" that, a short time before said date, E., who had never traded with the plaintiff before, applied to him for a sale of goods, and referred him, as to his standing and credit, to said bank; that at said date the plaintiff wrote to the defendant, as cashier of said bank, "as to the responsibility and financial standing of E.;" that the defendant replied by letter as follows: "Not familiar with detail of his business; he has paid all paper with his name upon maturity without protest promptly since my acquaintance with him," for a period of fifteen years; that the defendant, in making such representation, "did not deal fairly with the plaintiff and give him honestly such information as he had relative to the subject matter of the inquiry, but intended to and did deceive the plaintiff;" and that the plaintiff, relying on and deceived by the representations made by the defendant, sold and delivered goods to E., who at that time was insolvent and who failed in business, stopped payment, took the benefit of the insolvent law, and refused and neglected to pay the plaintiff for said goods. *Held*, on demurrer, that the declaration did not state a legal cause of action.

TORT. The declaration as amended was as follows: "The plaintiff says Stephen K. and Frank Edwards were copartners, residing and doing business as traders and commission merchants in Southbridge under the firm name of Wm. Edwards's Sons; that the defendant was and is cashier of the Southbridge National Bank in said Southbridge, and said Edwards's Sons did their banking business through and at the said bank; that said Edwards's Sons in August 1880, and for a long time before, were heavily indebted to divers persons in large sums of money, and were insolvent; that the said bank, from time to time and continuously, discounted commercial paper, notes, drafts, &c., for the said Edwards's Sons, on a large amount of which paper

were borne the names of William Edwards of said Southbridge and Jacob Edwards of Boston, the father and uncle respectively of said Edwards's Sons, as indorsers, sureties, or in some other relationship to the paper making them liable thereon; that the said Edwards's Sons had not, for a long time prior to the said August, been able to meet their current obligations when due by payment, and had procured extensions by new discounts of their paper from time to time with the aforesaid and other indorsers or sureties, and had met maturing obligations by using money procured on new loans for the purpose of increasing their deposits, all or a large portion of which transactions were at the said bank, and passed through the hands of, and were fully and intimately known to, the defendant, the cashier of said bank; that before, during and about the time of the transactions hereinafter set forth, the said Edwards's Sons were more than ever troubled to meet their maturing obligations at said bank, which the defendant well knew, and that during the same time said Edwards's Sons were buying goods in the market in quantities larger than usual and were disposing of them at prices below their market value, making drafts for the price of such sales and procuring them to be discounted by said bank through the hands of the defendant in irregular and unbusinesslike ways and on insufficient and unusual security, were putting goods bought by them in consideration of advances on them into the hands of third persons, to hold in trust as security for the advances, and were, by deposits of money thus obtained in said bank, managing to pay off the accruing liabilities on which their said father and uncle were holden; that the defendant received merchandise to hold as security for advances, and well knew and had reasonable cause to know the above-recited unusual, risky and deceptive manner in which said Edwards's Sons were transacting their business, that they were of doubtful standing and responsibility, and were likely to fail, and were insolvent.

“And the plaintiff further says, that, in June and July 1880, the said Edwards's Sons applied to the plaintiff, who is a wholesale coal merchant in New York City, for a sale of a large amount of coal; that said Edwards's Sons had never before traded with the plaintiff and were strangers to him, and referred

him for reference as to their standing and credit to the said bank; that the plaintiff applied in writing to the said bank, addressing the cashier thereof, for information as to the responsibility and financial standing of said Edwards's Sons, by letter as follows: 'New York, Aug't 3d, 1880. Cashier Southbridge Nat'l B'k, Southbridge, Mass.: Dear Sir, — The Messrs. Wm. Edwards's Sons of your town have referred me to your bank for information as to standing and responsibility. I shall esteem it a favor to receive from you anything bearing on same that you can give. With respect, yours, &c. Fredk. A. Potts, G. M. W.' And said defendant represented in writing to the plaintiff by letter on the 5th day of August, 1880, on the bottom of the above set forth letter from the plaintiff, regarding the standing and responsibility of said Edwards's Sons, in words and figures as follows: 'Not familiar with detail of their business; they have paid all paper with their name upon maturity without protest promptly since my acquaintance with them from 1865 to 1880. Yours Respty, F. L. Chapin, Ca., 8—5, 1880.' Intending thereby to give and giving the plaintiff to understand that they, the said Edwards's Sons, had met their paper at maturity by payments in money, or with funds on hand the proper property of said Edwards's Sons, or money or funds owned and obtained by them in the usual and ordinary course in which solvent men conduct their business, and not by the unusual and irregular methods of doing business set forth above, nor by renewals; and were so far as said defendant knew in good financial condition, standing and responsibility, whereas said defendant knew the said Edwards's Sons were heavily indebted as aforesaid, did not meet their paper at maturity by payments of money, or with funds on hand the proper property of said Edwards's Sons, or money or funds owned and obtained by them in the usual and ordinary course in which solvent men conduct their business, and not by the unusual and irregular methods of doing business set forth above, nor by renewals; and were practising the irregular and unusual methods of doing business set forth above. And plaintiff says the defendant in making such representation to the plaintiff did not deal fairly with the plaintiff, and give him honestly such information as he had relative to the subject matter of the inquiry, but intended to and

did deceive the plaintiff and mislead him into confidence in the said Edwards's Sons, and gave said Edwards's Sons a false and fictitious credit which he well knew they were not entitled to. And the plaintiff says that, relying on and deceived by the said representations of the defendant, he sold and delivered to the said Wm. Edwards's Sons a large quantity of coal of the value in all of three thousand four hundred thirty-seven $\frac{22}{100}$ dollars, except a small part thereof stopped in transitu; that, at the time of such sale and delivery, said Edwards's Sons were insolvent, did not expect or intend to pay for said coal, were utterly unable to pay for the same, and, before the delivery was completed as to so much thereof as was stopped in transitu by the plaintiff, they failed, stopped payment, took the benefit of the insolvent law of Massachusetts, and refuse and neglect to pay the plaintiff for said coal. Whereupon the plaintiff says he has a cause of action against the defendant for damages resulting to the plaintiff from the false and deceitful representations aforesaid made by the defendant to the plaintiff."

The defendant demurred to the declaration, on the ground, among others, that it did not state a legal cause of action. The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

W. S. B. Hopkins, for the plaintiff.

G. F. Hoar & A. J. Bartholomew, for the defendant.

FIELD, J. Taking the somewhat ambiguous language of the declaration most strongly against the pleader, and in the sense in which both parties in their briefs, and at the argument, agreed it was to be understood, namely, that the clause in the declaration, that "Edwards's Sons had not, for a long time prior to the said August, been able to meet their current obligations when due by payment, and had procured extensions by new discounts," &c., was to be construed to mean, not "that their paper had been dishonored, but only that they had resorted to the methods afterwards set forth to meet it," it is plain that there is no allegation that the statement contained in the letter of the defendant, that "Edwards's Sons have paid all paper with their name upon maturity without protest promptly," &c., was false. There is no allegation that this statement, though literally true, was false in the sense in which the plaintiff understood it, and

as reasonable men had a right to understand it. The other allegations are in substance that the defendant knew that Edwards's Sons were insolvent, and that they were "meeting their current obligations in irregular and unbusinesslike ways, and were transacting their business in an unusual, risky and deceptive manner," the particulars of which are set out in the declaration; and that the defendant in making the representations to the plaintiff contained in the letter "did not deal fairly with the plaintiff and give him honestly such information as he had relative to the subject matter of the inquiry, but intended to and did deceive the plaintiff," &c. This is a statement that the defendant concealed material facts which he knew, for the purpose of deceiving the plaintiff, so that he would give credit to Edwards's Sons which the defendant believed he would not give if these facts were made known. It is undoubtedly true that the fraudulent concealment of known facts with the intent to mislead, and which does in fact mislead another to his damage, does not constitute actionable fraud, unless there be some obligation which the law recognizes to disclose the facts concealed.

No relation existed between these parties which imposed any obligation in this respect upon the defendant. He was not bound to answer the plaintiff's letter, but if he answered it at all, he was bound to tell the truth. If he expressed an opinion upon the solvency of Edwards's Sons, it must be his real opinion; if he stated a specific fact, he must state it as he believed it to be; and if he stated a fact positively as of his own knowledge, he must know the fact to be as stated.

The inquiry of the plaintiff was as to the "standing and responsibility" of Edwards's Sons. The defendant in reply stated one fact, which, it is contended, had some tendency to show that Edwards's Sons were of "good standing and responsibility." If the defendant purposely concealed any fact, the existence of which rendered the representation he made untrue, then it is strictly a case of false representations, even although the decision is put upon the ground of a fraudulent concealment of a material fact; but the concealment in the case at bar is of independent facts, which do not contradict the representation made, but from which, it is contended, an inference in regard to

pecuniary standing and responsibility might be drawn different from that naturally to be drawn from the fact represented.

The plaintiff relies upon *Tryon v. Whitmarsh*, 1 Met. 1. There the representation was that one Whitney was entitled to credit, and the decision was that the jury should have been instructed "that notwithstanding they should find all the said propositions in favor of the plaintiffs, still the defendant would not be liable, if they were of opinion, from the evidence, that he gave an honest opinion, and truly believed that the persons recommended were trustworthy;" and, although it is said in the opinion "that the question for the jury was, whether the defendant knew that the assertion or opinion contained in his letter was false, or that he did not fully believe it to be true; or whether he did not conceal a material fact from the knowledge of the plaintiffs, with the intent to deceive them;" yet the case did not call for any determination of the question whether the mere concealment of material facts with the intention to deceive would support an action for deceit.

Kidney v. Stoddard, 7 Met. 252, is a stronger case for the plaintiff. The representation was "that A. D. S. Jr.'s contracts, of whatever nature, will unquestionably be punctually attended to," and the concealment was of the fact that A. D. S. Jr., who was the son of the defendant, was a minor. The decision is put distinctly upon the ground of an intentional concealment of a material fact important to be known, with the design to obtain credit for his son, which he knew could not be obtained if the fact of his infancy were known; and *Tryon v. Whitmarsh*, *ubi supra*, and *Lobdell v. Baker*, 1 Met. 193, are cited.

But *Lobdell v. Baker* was decided upon the ground, that if one puts into circulation a promissory note indorsed by a minor, "with nothing to rebut the natural inference to be drawn from it, he by necessary implication affirms that the indorser is a person capable of indorsing, and binding himself by such indorsement;" and that this implied representation, being false to the knowledge of the defendant, was a fraud in law, if not in fact, and would support an action of tort for false representations. *S. C.* 3 Met. 469. Apart from the form of the action, the foundation of the obligation of the defendant was the warranty, implied in the sale of negotiable paper, that the names upon it are genuine

and of persons competent to contract. *Merriam v. Wolcott*, 3 Allen, 258, 260.

In *Kidney v. Stoddard*, *ubi supra*, it appears to have been assumed that the representation made by the defendant was a representation that the son of the defendant was a person worthy of credit; and the decision can be reconciled with the rule of law, as generally stated, by holding that the concealment of the fact of the infancy of the son was the concealment of a fact which rendered the representation made false, because an infant may avoid his contract, and is therefore not a person worthy of credit. Indeed, it is reasonable to hold that, if one person recommends another as entitled to credit, he impliedly represents that he is a person who can bind himself by a contract.

In *Peek v. Gurney*, L. R. 6 H. L. 377, 403, Lord Cairns states the rule of law as follows: "Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false." And Lord Chelmsford, on p. 391, says, "Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him, it appears to me that this additional element exists in the present case." "I cannot doubt that there was, beyond the passive concealment of the state of affairs of the old firm, an active misrepresentation of the truth by the respondents."

Baron Bramwell, dissenting in *Lee v. Jones*, 17 C. B. (N. S.) 482, 508, says: "To constitute fraud, there must be, — first, the assertion of something false; which is not the case here, — or, secondly, the suppression of something true, where there is a duty or profession of stating everything material; and here there is

no such duty, — or, thirdly, what perhaps is included in one of the foregoing, a suggestion of falsity, by statement of some facts, and suppression of others which would qualify those stated." Mr. Justice Crompton, concurring with the majority, in the same case, p. 510, says: "To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existing of some untrue fact: but, if it be made by one party in such terms as would naturally lead the other party to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms." These statements of the law differ in the nearness or remoteness of the connection required between the facts stated and the facts concealed in order to constitute a suggestion of what is false or a misleading representation.

The decision of the case at bar must depend upon the question whether the declaration describes such "a suggestion of falsity" in the representations made as to constitute a fraudulent misrepresentation. The defendant disclaimed all knowledge of the details of the business of Edwards's Sons, and expressed no opinion generally upon their "standing and responsibility." He did not undertake to make any representation upon the manner in which they obtained funds for the payment of their notes, or the terms upon which they obtained discounts, or the amount of their obligations. He did not profess or undertake to state all the facts material to be considered in determining their solvency. He did not request or invite the plaintiff to sell merchandise to them on credit. He stated a single fact which was true. The significance of this fact standing alone it is impossible judicially to declare; but it must be known to all merchants that the length of time which a person will continue to pay his notes at maturity cannot be determined by the length of time he has already so paid them. If it is said that the representation made suggested something that is false, it is impossible with any reasonable definiteness to state the facts which it suggested. The answer of the defendant implied that he was unwilling to take the responsibility of saying that Edwards's Sons were of good standing, but it implied nothing in regard to their methods of doing business except what it

expressly stated, namely, that they had paid their notes at maturity. We think it would be an unwarrantable extension of the law relating to fraudulent misrepresentations to hold the defendant liable on the facts stated in this declaration.

Judgment affirmed.

SILAS B. HOWE *vs.* JAMES M. TAGGART & another.

Worcester. Oct. 8, 1881. — Sept. 7, 1882. LORD, W. ALLEN & C. ALLEN, JJ., absent.

The defendant in an action, after he had filed an answer to the declaration, which contained two counts, on the plaintiff's filing a third count, filed, by leave of court and the consent of the plaintiff, an answer containing a demurrer to the whole declaration. The plaintiff gave his consent, supposing that it was an answer to the third count only; and it did not appear that the judge understood that it was an answer and a demurrer to all the three counts when he gave leave to file it. The judge ordered the demurrer to be confined to the third count. *Held*, that the defendant had no ground of exception.

An agreement to forbear bringing suit for a debt due, for an indefinite time, if followed by actual forbearance for a reasonable time, is a good consideration for a promise to pay the debt by a person other than the debtor.

A person, by signing a promissory note after it has been delivered, although for a distinct consideration sufficient to support his contract, does not become a joint and several promisor with the maker, if the original obligation of the latter on the note is not destroyed.

CONTRACT against James M. Taggart and James M. Taggart, Jr. Writ dated June 16, 1880. The declaration originally contained one count on a promissory note for \$300, dated April 1, 1871, payable to the plaintiff or order, and purporting to be signed by both defendants. The plaintiff was allowed to amend his declaration by filing a second count, for the same cause of action, alleging that James M. Taggart made a promissory note payable to the order of the plaintiff, and the defendant James M. Taggart, Jr. thereafter, in consideration that the property for which said note was given should pass to and remain in his hands, and that the plaintiff would then forbear to sue or collect said sum from said James M. Taggart, promised and agreed to pay said note and interest, and now owes the plaintiff the amount of said note and interest.

The answer of James M. Taggart, Jr. denied making the note declared on in the first and second counts, and averred that, if he made it, it was without consideration.

The plaintiff subsequently filed a third count to his declaration. The defendant then filed, by leave of court and the consent of the plaintiff's counsel an answer containing a demurrer to the whole declaration, as amended, and to the several counts thereof.

At the hearing on the demurrer, in the Superior Court, before *Staples, J.*, the plaintiff's counsel stated that he gave his consent to said filing under a mistake of fact, supposing it was an answer to the third count only, and that he did not read the same before giving his consent. It appeared, on inspection of said answer and demurrer, that it was entitled an "answer" originally, and the words "and demurrer" were added by the clerk after filing. The demurrer was sustained as to the third count, which was adjudged bad; but the judge refused to entertain the demurrer as to the residue of the declaration, the same having been already answered to on the merits, and ruled that the demurrer should be confined to the third count.

The judge directed the trial to proceed before the jury on the first and second counts of the declaration and the first answer thereto.

It appeared in evidence that the note in suit was made and delivered to the plaintiff by James M. Taggart alone, at its date; that the sole original consideration for it was the sale and conveyance of a certain tract of land by the plaintiff to James M. Taggart, who paid the interest on said note annually to and including that paid in 1878, and that James M. Taggart, Jr. had no interest or participation in this original consideration, and that there was no agreement for another name or additional security on the note at the time of the making and delivery by the first signer. The defendants were father and son.

The plaintiff testified that he went to James M. Taggart in July 1878, and saw Taggart, Jr.; that he passed him the note, and said, "I want you to sign it, as you have the property. I think it just and right you should. Your father says he can't pay it. It may remain by your signing it." And that he then in the presence of his father signed the note and gave it to the

plaintiff; that the property meant was the land he had conveyed; that on April 1, 1879, he received the interest then due from Taggart, Jr.

The plaintiff offered in evidence a deed from Taggart to his son, being the conveyance before referred to. The evidence was admitted against the defendants' objection, as explanatory of the conversation between the parties, and for no other purpose. The deed was in common form, dated April 1, 1878, of all the real estate of Taggart, in consideration of \$9300, to Taggart, Jr. Said real estate included the tract for which the note in suit was originally given by James M. Taggart.

At the close of the testimony, James M. Taggart, Jr. asked the judge to rule that, on the pleadings and proofs, the action could not be maintained on either count of the declaration, and that the plaintiff could not recover on the first count because this defendant's name was not put on the face of the note till several years after it was given; and that on the evidence there was no consideration in law for the signing of the note by this defendant, and no evidence that this defendant ever made the note declared on in the first count; and that there was a fatal misjoinder of the first and second counts.

The judge refused to give any of the rulings requested, but ruled that if for a sufficient consideration, the parties all being together, Taggart, Jr., at the plaintiff's request, signed the note as maker, by placing his signature thereon under that of his father, intending thereby to adopt the words of the contract as written and to make the note his own, and to subject himself to the liability of a co-promisor thereon, Taggart, Sr. agreeing and consenting to all the foregoing, and Taggart, Jr. then delivered the note to the plaintiff as and for the note of both signers, his father consenting and agreeing to such delivery, and the son afterwards paid interest on said note when due, Taggart, Jr. was liable in this action, no other objection existing to a recovery. The judge also ruled, that an agreement on the part of the plaintiff with Taggart, Sr. to forbear to sue the note, though for an indefinite time, and forbearance accordingly, was a sufficient consideration for the signing of the note by Taggart, Jr.

The case was submitted to the jury on the first count only, and the first answer thereto.

The jury returned a verdict for the plaintiff against Taggart, Jr., and assessed damages in the sum of \$300. The defendant Taggart, Jr. alleged exceptions.

G. H. Ball, for the defendant.

W. A. Gile, for the plaintiff.

FIELD, J. The defendant cannot complain that his demurrer to the third count was sustained. He does complain that "the judge refused to entertain the demurrer as to the residue of the declaration, the same having been already answered to on the merits." It appears that the defendant, after he had filed an answer to the first two counts of the declaration, on the plaintiff's filing a third count, filed, by leave of court and the consent of the plaintiff, an answer containing a demurrer to the whole declaration. The plaintiff gave his consent, supposing that it was an answer to the third count only, and it does not appear that the court understood that it was an answer and a demurrer to all the three counts when it gave leave to file it. The order of the presiding justice confining the demurrer to the third count was within his discretion.

The trial proceeded on the first and second counts and the original answer thereto, and the case was submitted to the jury on the first count only. It does not appear to have been contended by the plaintiff that the conveyance of the land by Taggart to Taggart, Jr. was the consideration of the promise of Taggart, Jr. to the plaintiff. Apparently, this conveyance was made April 1, 1878, and Taggart, Jr. signed the note in July following. The consideration relied on was the promise of the plaintiff, that, if Taggart, Jr. would sign the note, "it might remain," or, in other words, the promise of the plaintiff that he would forbear suing Taggart.

It seems to have been assumed in this Commonwealth that an agreement to forbear bringing suit for a debt due, even although for an indefinite time, and even although it cannot be construed to be an agreement for perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise. *Prouty v. Wilson*, 123 Mass. 297. *Robinson v. Gould*, 11 Cush. 55. *Boyd v. Frieze*, 5 Gray, 553. *Ellis v. Clark*, 110 Mass. 389. *Pratt v. Hedden*, 121 Mass. 116. *Mecorney v. Stanley*, 8 Cush. 85. *Manter v. Churchill*, 127

Mass. 31. See also *Coles v. Pack*, L. R. 5 C. P. 65; *Oldershaw v. King*, 2 H. & N. 517.

The jury returned a verdict for the plaintiff on the first count. This was a count on a promissory note, in which it was alleged that both defendants made the note, a copy of which was annexed, and which purported to be signed by both defendants, and dated April 1, 1871. It was a copy of the note which Taggart gave April 1, 1871, and which Taggart, Jr. signed in July 1878. To support this count, it was necessary to prove that, after Taggart, Jr. signed the note, it was delivered to the plaintiff, on a good consideration, as a new original contract of both defendants. No evidence appears that would warrant any such finding. The whole evidence recited in the exceptions shows that all parties intended and understood that Taggart was to continue liable on the note, according to the obligation he entered into when he gave it on April 1, 1871; and that the obligation assumed by Taggart, Jr. when he signed it in July 1878 was additional and collateral to this obligation of Taggart. There was no evidence, so far as appears, that this original obligation of Taggart on the note was destroyed, and, while that remained, Taggart, Jr. could not become a joint and several promisor with him by signing the note, although he signed it for a distinct consideration sufficient to support his contract. *Stone v. White*, 8 Gray, 589.

The instructions given by the presiding justice did not discriminate with sufficient care between becoming a party to a contract already subsisting, and executing with another person a new contract, and apparently were not adapted to the evidence.

Exceptions sustained.

CHARLES G. DAVIS & others vs. FRANCIS A. SAWYER
& others.

Plymouth. Jan. 25. — Sept. 7, 1882. ENDICOTT & FIELD, JJ., absent.

The ringing, at an early hour in the morning, (for the purpose of arousing the keepers of boarding-houses where operatives in a mill live, or for the purpose of arousing the operatives themselves,) of a bell weighing two thousand pounds and set in an open tower forty feet from the ground, and so situated with respect to the residences of persons, owned and occupied by them before the erection of the bell, that they receive the full force of the sound, such persons being thereby deprived of sleep during hours usually devoted to repose, and personally annoyed and disturbed, and the quiet and comfort of their homes impaired, is a private nuisance to them; the owner of the mill may be restrained by injunction from ringing the bell for such purposes, the ringing not being shown to be necessary or reasonable; and evidence of a custom to ring the bells in other places for similar purposes is inadmissible.

W. ALLEN, J. This is a bill in equity praying for an injunction to restrain the defendants from ringing a bell. The case comes here on appeal by the defendants from a decree entered by a single judge, enjoining them from ringing the bell earlier than half after six o'clock in the morning. The plaintiffs for many years have owned and occupied dwelling-houses situated, one about one thousand feet, and the other about three hundred feet, from a woollen mill of the defendants. The defendants began to run their mill, which had been before that occupied by other persons, in December 1879, and about January 1, 1880, placed the bell upon the mill, and caused it to be rung every working day at five o'clock, and twice between six and six and one half o'clock, in the morning, and at other times during the day, except that the five-o'clock bell was discontinued during the summer months.

The plaintiffs allege that the bell as rung is a private nuisance to them, and injures their property, and disturbs the quiet and comfort of their homes; that it is not necessary for any purpose of trade or manufacture; that it is unnecessarily large, and rung at unseasonable hours, and unreasonably long. The defendants in their answer deny that the bell is a nuisance to the plaintiffs, and say that it is used by the defendants to summon the operatives in their mill to work; that it is necessary and customary to adopt some method to summon operatives in such a manufactory

to its effects than the plaintiffs were. That was the effect it was intended to produce, and, if it had not in fact produced the effect, its use would not have been continued. The fact that some persons may have had such associations connected with the sound that it may have been to them a pleasure rather than an annoyance, or that the sensibility of others to the sound may have become so deadened that it ceased to disturb them, shows that the noise was not a nuisance to them, but does not change its character as to others. Many persons can, by habit, lose, to some extent, their sensibility to a disturbing noise, as they can to a disagreeable taste or odor or sight, or their susceptibility to a particular poison, but it is because they become less than ordinarily susceptible to the particular impression. In this case, the evidence shows that persons were awakened and disturbed by the bell until they had lost ordinary sensibility to its sound.

The other question presented is, whether the plaintiffs are entitled to an injunction. Upon general principles, they would be entitled to an injunction against a nuisance of this nature, for the obvious reason that they can have no adequate remedy in actions at law for damages. *Cadigan v. Brown*, 120 Mass. 493. But the defendants argue that relief by injunction is in the discretion of the court, and will not be granted where it will be inequitable between the parties, or will work detriment to the public, and that, in this case, the abatement of the nuisance by injunction will involve damage to the defendants in a lawful business, carried on by them to the public benefit, disproportionate to the damage to the plaintiffs from its continuance; and that the court ought not to interfere by injunction, but leave the plaintiffs to their remedy in damages which may be recovered in actions at law. The business in which the defendants are engaged is such a business; and if it appeared that the effect of an injunction would be to materially affect it, the argument for the defendants would be of great weight. But the evidence does not show that the ringing of the morning bells is at all essential to the defendants' business, or that it is anything more than a convenience to them. The time for commencing work in the mill was at half after six o'clock in the morning, and the ringing of the morning bells was to aid the operatives in being at their work at that time. It may be convenient for

the boarding-house keepers to be called at five o'clock, and for the defendants' operatives to be called at six o'clock, and to be summoned to the mill at half after six o'clock; but the evidence wholly fails to show that there are not other and equally effective methods of accomplishing the result which will not interfere with the rights of the plaintiffs. The custom in other places cannot affect the rights of the plaintiffs. The question is, largely, what is reasonable under the circumstances peculiar to the case. The defendants have adopted a certain method for producing a result subordinate in their business; they thereby do damage to the plaintiffs. If that method is so necessary to their business that it is reasonable that they should use it, notwithstanding the damage it does to the plaintiffs, then it is reasonable that the plaintiffs should suffer the damage, or obtain an indemnity by an action at law. But it is for the defendants to show that their act is, under all the circumstances, reasonable; and we think that the evidence warranted the judge before whom the case was heard in finding that the ringing of the bell before the hours of six and one half o'clock in the morning was not necessary or reasonable.

*Decree affirmed.**

N. Morse & E. W. Hutchins, for the defendants, cited *Scott v. Firth*, 10 Law Times (N. S.) 240; *Gaunt v. Fynney*, L. R. 8 Ch. 8; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Walter v. Selfe*, 4 DeG. & Sm. 315; *White v. Cohen*, 1 Drew. 312; *Ripon v. Hobart*, 3 M. & K. 169; *Attorney General v. Nichol*, 16 Ves. 338; *Salvin v. North Brancepeth Coal Co.* L. R. 9 Ch. 705; *Fay v. Whitman*, 100 Mass. 76; *Gilbert v. Showerman*, 23 Mich. 448; *Richards's appeal*, 57 Penn. St. 105; *Huckenstine's appeal*, 70 Penn. St. 102; *Dumesnil v. Dupont*, 18 B. Mon. 800; *Hahn v. Thornberry*, 7 Bush, 403; *Jordan v. Woodward*, 38 Maine, 423.

C. G. Davis, for the plaintiffs, among other cases, cited *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Harrison v. St. Mark's Church*, 3 Weekly Notes (Penn.) 384.

* Section 1 of the St. of 1883, c. 84, which was approved on March 28, and took effect upon its passage, is as follows :

"Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such manner and at such hours, as the board of aldermen of cities and the selectmen of towns may in writing designate."

SIMEON BOWEN *vs.* CLARENCE H. RICHARDSON, executor,
& others.

Bristol. January 13, 1880; June 29. — September 6, 1882.

If two executors have united in misusing funds in their hands, in the purchase of land for their own benefit, and profits have arisen from such purchase, which are held by one of them, or the title to the land stands in the name of one of them, and it does not appear that the persons interested in the estate are debarred by acquiescence or otherwise from their right to avail themselves of the advantage of the purchase, the other executor cannot maintain a bill in equity for an account and for the payment to him of a proportionate share of the profits.

BILL IN EQUITY against the executor, heirs and next of kin of Stephen Richardson, for the settlement of a copartnership for buying and selling real estate, which the bill alleged existed between the plaintiff and Stephen Richardson.

The case was referred to a master, the material parts of whose report were as follows: "I find and report that there was a copartnership for buying and selling real estate between the plaintiff and Stephen Richardson, which began on or about April 1, 1862, and terminated March 1, 1877, by the death of said Stephen Richardson. There were no written articles of copartnership between the parties, but it was verbally agreed between them that they should divide the profits and losses equally between them, and that whenever one of the parties advanced the consideration money for a purchase of land, he should be allowed interest thereon, and the record title should be in his name. I find and report that the Capron lot, so called, the record title to which, on said March 1, 1877, was in said Stephen Richardson, was the property of said plaintiff and said Stephen Richardson as copartners aforesaid; that the consideration money for the Capron lot, which was the last purchase of real estate on copartnership account, was paid, as stated in the amendment to the plaintiff's bill, which statement is as follows: 'The consideration was advanced in fact by said Richardson in the sum of \$1700, then in his hands, belonging to an estate of which said Richardson and the plaintiff were joint executors, and for which said Richardson gave the plaintiff his promissory note, payable to the order of said executors, which said note said Richardson

thereafterwards, namely, on September 1, 1876, renewed for the principal sum, which has never been paid, but now remains in the hands of the plaintiff as surviving executor.'

"I find and report that the consideration money for the Capron lot has never been repaid to the said Stephen Richardson or his executor, but that the interest on the same was paid up to September 1, 1876. There was no memorandum in writing as to the Capron lot signed by said Stephen Richardson, and no declaration of trust, so signed, was produced in evidence. But there was an item for \$201 profits on the Capron property, which was allowed in a settlement between the plaintiff and said Richardson. And said Richardson gave the plaintiff a writing containing a statement of the rents received from the Capron property and the expenses incurred on said property.

"I find and report that, upon the final settlement of the copartnership affairs, there should be allowed and paid to the defendants, out of the plaintiff's share of the copartnership property, the sum of \$850, being one half of the consideration money for the Capron lot, and interest thereon from September 1, 1876, to the date of final settlement, according to the agreement of the copartners, the said Stephen Richardson having paid the consideration money for the Capron lot as hereinbefore stated. And in case the plaintiff's share of the copartnership property shall be insufficient to pay said sum, then the defendants shall have a claim against the plaintiff to the extent of such deficiency. The said Stephen Richardson and his representatives have been in possession of the Capron lot since the settlement of September 1, 1876, taking the rents and profits. I find and report that they have received as rents from the Capron property, from September 1, 1876, to December 1, 1878, the sum of \$648."

The material exceptions filed by the defendants to the master's report were as follows:

"First. It appears by the master's report and the amendment to the plaintiff's bill in connection with said report, and referred to therein, that the Capron lot was bought with funds, in the hands of Stephen Richardson, belonging to an estate of which the plaintiff and said Richardson were co-executors, Stephen Richardson giving at the time only his note to said co-executors for the amount so taken; and said transaction does not appear

to have been assented to or ratified by any other person or persons interested in said trust estate than said co-executors. The defendants should not, therefore, be held to account in this suit with the plaintiff for the said Capron lot, or the rents and profits thereof.

“Second. Because it appears by the master’s report, and the amendment to the plaintiff’s bill, referred to in said report, that the Capron lot was not bought with partnership funds, and that no memorandum in writing, signed by Stephen Richardson, or declaration of trust so signed, was produced in evidence, relating to or including this lot. The defendants should not, therefore, now or on final settlement, be charged with the value of this lot, or with the rents and profits thereof, or be held to account, in this suit, with the plaintiff as to either.”

The case was heard by *Lord, J.*, on the master’s report and the exceptions thereto, and reserved for the consideration of the full court.

If, upon the foregoing facts and exceptions, the plaintiff was entitled to a sale of the Capron lot, as copartnership property, a division of the proceeds of such sale, and a division of the rents and profits from that lot, a decree was to be entered accordingly; otherwise the Capron lot, and the rents and profits accruing therefrom, were to be omitted from the account between the parties.

E. Ames, for the plaintiff.

J. M. Gould, for the defendants.

C. ALLEN, J. By the plaintiff’s averments in his bill, as amended, and by the master’s report, it appears that the consideration paid for the lot of land now in controversy was advanced by Stephen Richardson from funds in his hands, belonging to an estate of which he and the plaintiff were joint executors, and for which Richardson gave to the plaintiff his promissory note, payable to the order of said executors; and that said note has never been paid, and now remains in the hands of the plaintiff as surviving executor. The defendants are the executor of the will of Richardson and his next of kin; and, in an exception to the master’s report, they set forth that this transaction does not appear to have been assented to or ratified by any other person or persons interested in said trust estate than said co-executors; and,

in the brief submitted in their behalf, the grounds are taken that the act of the co-executors was fraudulent, and that the plaintiff cannot have personal relief in equity, whatever may be his rights as surviving executor; that no disinterested person representing the trust estate is before the court as a party; and that the defendants should not be required to perform the nugatory act of accounting with the plaintiff, when both the plaintiff and the defendants can be again called immediately to account by the beneficiaries.

Without considering other grounds of defence, we are of opinion that the above grounds must prevail, and that the plaintiff is not entitled to the aid of a court of equity to enable him to avail himself, for his own personal benefit, of the profits arising from the purchase of the lot of land in question.

X The rule is general and fundamental, that no person holding trust funds can be allowed to derive any personal gain or advantage, either directly or indirectly, from the use thereof, but he must manage them with a single eye to the advantage of the trust estate; and, if he assumes to use them in any manner for his own benefit or in his own business, he must account for all the profits arising from such use, if profits are made, or for the principal and interest, in case of loss. The persons interested in the trust estate have the option of taking the profits, or of taking interest. This rule is applicable to every kind of fiduciary relation: to executors, administrators, trustees, guardians, directors of corporations, and all persons who hold funds in trust for others. It is also applicable to every mode in which such trustees may either directly or indirectly seek to derive a personal gain or advantage from the use of trust funds, whether by using the same in their personal business, or by treating the same as a loan to one or more or all of themselves, either with or without security, or to their partners, or to a firm of which they are members, or otherwise. Whatever form the transaction may assume, the salutary rule must be enforced which forbids them from reaping a personal profit from the method which they adopt of investing or managing the trust estate. The cases are numerous in which these doctrines have been applied, and approved text-books contain frequent repetitions of them. It will be necessary to refer to only a few of each. X *Townend*

v. *Townend*, 1 Giff. 201, 212. *Wedderburn v. Wedderburn*, 22 Beav. 84, 100. *Stickney v. Sewell*, 1 Myl. & Cr. 8. *Heathcote v. Hulme*, 1 Jac. & W. 122, 131. *Norris's appeal*, 71 Penn. St. 106, 125, 126. *Shaler v. Trowbridge*, 1 Stew. (N. J.) 595, 602. Wms. on Executors (6th Am. ed.) 1841, 1842, and notes *k, m, o*. Lewin on Trusts (7th ed.) 253, 254, 298, 299, 312. Perry on Trusts, §§ 127, 128, 429, 432, 454, 464.

These doctrines are applicable to the present case. By using the funds in their hands for the purchase of real estate, the executors became responsible in their fiduciary or official capacity for all the profits which might arise from such purchase. Upon the facts alleged by the plaintiff, and urged in defence by the defendants, it is the duty of both the plaintiff and the defendants to give to the estate which furnished the purchase money the benefit of the purchase. The beneficiaries in that estate have the option to take the profits, or to take interest on the money. It does not appear that they have renounced this option, or elected to take the interest merely. Under this state of things, the plaintiff has no equitable title to a share in these profits. He can only establish such title by showing affirmatively such an election by the beneficiaries, or such acquiescence by them in the transaction as amounts to such an election. From the tenor of the defendants' argument, it is to be presumed that they intend to make the proper appropriation of the profits of this purchase, as soon as they are advised by this court that they can safely do so. But, however this may be, where two executors have united in misusing the funds in their hands, in the purchase of land for their own benefit, and profits have arisen from such purchase, which are held by one of them, or the title to the land stands in the name of one of them, and it does not appear that the persons interested in the estate are debarred by acquiescence or otherwise from their right to avail themselves of the advantage of the purchase, the other executor cannot maintain a bill in equity for an account, and for the payment to him of a proportionate share of the profits. *Decree accordingly.*

STEPHEN P. SIMMONS *vs.* LAWRENCE DUCK COMPANY.

Essex. Nov. 3, 1881. — Sept. 7, 1882. MORTON, C. J., W. ALLEN & C. ALLEN, JJ., absent.

A declaration alleged that the plaintiff and defendant entered into a written contract, a copy of which was annexed; that the plaintiff was induced to execute it by fraudulent misrepresentations of fact by the defendant; that the plaintiff was not bound by it, but was entitled to recover what the labor performed and furnished was reasonably worth; and concluded with an allegation like that contained in an account annexed. *Held*, that it was a good declaration on an account annexed; and that the unnecessary averments might be rejected as surplusage.

A declaration alleged that the plaintiff and defendant entered into a written contract, a copy of which was annexed; that the plaintiff entered upon the performance of the contract, but the defendant neglected to perform his part of the contract, and prevented the plaintiff from performing the contract, whereby the plaintiff was greatly injured and damaged; and concluded with an allegation like that contained in an account annexed. *Held*, that the count contained two inconsistent causes of action, and was bad.

If a written contract for work to be done is fully performed, the stipulated price may be recovered in an action upon a common count or an account annexed.

If a plaintiff, after doing work under a written contract, has the right to avoid or rescind the contract, he may recover what his labor is reasonably worth, under a common count or an account annexed.

In an action on an account annexed for work done and materials furnished, it appeared that the plaintiff had performed work and furnished materials, during the times stated in the account, under two proposals and a subsequent contract. Neither of the proposals was identical in terms with the other, or with the contract, though they had many things in common. They all referred to plans and specifications, which did not appear in the defendant's exceptions on which the case came before this court. There was oral evidence that the plans and specifications referred to in the proposals and the contract were the same, and that the parties intended to reduce their contract to writing, but delayed it until the contract in question was made. There was evidence that the plaintiff had been prevented from performing the final contract by the act of the defendant. The jury were instructed, at the request of the defendant, that the plaintiff could not recover for work done and materials furnished, not done and furnished under the final contract, and were further instructed, against the defendant's objection, that whether the work done and materials furnished prior to the date of that contract were done and furnished under that contract, was for the jury to determine on all the evidence in the case. *Held*, that the defendant had no ground of exception to the admission of the evidence, or to the instructions given.

CONTRACT for work done and materials furnished. At the trial in the Superior Court, before Colburn, J., the jury returned a verdict for the plaintiff for the full amount claimed; and the defendant alleged exceptions, which appear in the opinion.

C. G. Saunders, for the defendant.

E. T. Burley & C. U. Bell, (*E. J. Sherman* with them,) for the plaintiff.

FIELD, J. The plaintiff's declaration as amended contained four counts. The first is in the nature of a common count for work done; the second is a count on an account annexed, and the account annexed includes items from November 1871 to July 30, 1872; the third count, after setting forth that the parties executed a contract in writing, a copy of which is annexed, and is dated June 15, 1872, alleges that the plaintiff was induced to execute this contract by fraudulent misrepresentations of facts by the defendant, and that he was not bound by it, but was entitled to recover what the labor performed and furnished was reasonably worth, which sum was stated, and concludes with an allegation like that contained in a count on an account annexed, and may be considered such a count, the inducement being rejected as surplusage. *Ford v. Burchard*, 130 Mass. 424.

The fourth count alleges that the parties executed a contract in writing, a copy of which is annexed, and is the same contract referred to in the third count; that the plaintiff entered upon the performance of the contract, but the defendant neglected and refused to perform its part of the contract and prevented the plaintiff from performing the contract, whereby the plaintiff was greatly injured and damaged; and it also concludes with an allegation like that contained in a count on an account annexed. This count is bad in substance, because it contains two inconsistent causes of action in contract, one being the breach of a special contract, and the other a *quantum meruit* for work done. *Mullaly v. Austin*, 97 Mass. 30.

The demurrer of the defendant was waived at the argument.

The theory of the plaintiff apparently was, that the proposal of the plaintiff of October 11, 1871, which was accepted by the defendant and under which some work was done, and the proposal of November 11, 1871, which was also accepted and under which work was done, were both superseded by the contract formally executed on June 15, 1872, which was intended by the parties to cover all the work done by the plaintiff; and that the plaintiff had the right to avoid this contract, because it was procured by fraudulent misrepresentations, and also to rescind it

because the defendant had refused to perform its part of it and had prevented the plaintiff from performing it, and, the contract being thus avoided or rescinded, the plaintiff could recover on an account annexed for all work done.

The acceptance of each of these proposals constituted a contract, and if each of these contracts had been fully performed by the plaintiff, so that nothing remained to be done but the payment of the stipulated price, the plaintiff could recover this under a count in the nature of a common count or a count on an account annexed. *Cullen v. Sears*, 112 Mass. 299.

If the plaintiff had the right to avoid or rescind the contract of June 15, 1872, and elected to do so, he could recover under either of these counts, for the work done under this contract, what it was reasonably worth. If the work agreed to be done under each of the contracts, made by accepting the proposals, was not completed, and, before completion, these contracts were annulled by the parties, and a new contract, including the same and other work, made, and if this new contract was one which the plaintiff had the right to avoid or rescind for the reasons stated, and he elected to do so, he could then recover, under either of these counts, for all work done by him under all the contracts, whatever the work was reasonably worth. *Fitzgerald v. Allen*, 128 Mass. 232.

No two of the three contracts are identical in terms, although they all have many things in common. They all provide that the work shall be done "according to plans and specifications," none of which appears in the papers. The amount of the different kinds of work to be done is in most cases left indefinite in the contracts themselves; whether the plans and specifications would make this definite, we do not know. Some materials were to be furnished by the plaintiff under each of these contracts, which are included in the items of the account annexed, although the other counts declare only for work and labor done.

It appears in the exceptions that the "plaintiff contended, and introduced evidence tending to prove, that, although labor and materials were furnished by him between October 11, 1871, and June 15, 1872, the plans and specifications referred to in said proposals and contract were one and the same; that the parties intended to reduce the contract to writing, but the same

was delayed for no particular reason until June 15, 1872;" and to the introduction of this testimony no objection appears to have been made or exception taken. The defendant made four requests for instructions, the first three of which were given, except the first clause of the first, and it has not been argued that the refusal to give that was error, and it plainly was not.

The effect of these instructions was that the plaintiff must be confined to work done and materials furnished under the contract of June 15, 1872. If these instructions are erroneous, the defendant cannot complain, as they are in his favor. The fourth request of the defendant, which the court refused to give, was this: "That the plaintiff cannot recover for work and labor under the contract set forth in his declaration, which were rendered and performed prior to the date and execution of said contract." Apparently, this was rightly rejected. The first three counts of the plaintiff's declaration were not for the breach of a contract, but were for work done. The second count also included materials furnished.

The court instructed the jury, at the request of the defendant, "that they could not find for the plaintiff for any work and materials not performed and furnished under the contract dated June 15, 1872;" and, against the defendant's objection, further instructed them, "And whether the work and materials performed and furnished prior to that date were performed and furnished under that contract was for them to determine, upon all the evidence in the case." To the first part of this instruction the defendant cannot object, as it was given at his request, and is in his favor.

If this whole work was one continuous piece of work done for the purpose of making certain changes in the yard of the defendant, and if the plans and specifications referred to in all the contracts were the same, and distinctly indicated the kind and quantity of work to be done, and included all the work done by the plaintiff, and if the contract of June 15, 1872, was executed while the work was in progress, and the former contracts were abandoned by the parties, the court might perhaps have ruled, as matter of law, that the contract of June 15, 1872, must be presumed to be the final agreement of the parties in regard to all work done according to the plans and specifications. *Davis*

Sewing Machine Co. v. Stone, 131 Mass. 384. *Goodnow v. Dav-enport*, 115 Mass. 568.

But upon that we can give no opinion, because the plans and specifications, which are a part of the contract, are not before us for construction in connection with the rest of the contract. When one person agrees in writing to do certain work for another, according to certain specifications, for a price which the other agrees in writing to pay, and it appears that a part of the work specified has already been done by the first party at the request of the other, it may happen that something in the nature of a latent ambiguity is disclosed; for the terms of the whole contract may be such that the fact that a part of the work was done before the execution of the contract, which is a fact extrinsic of the written contract, may make it doubtful whether the work already done is to be paid for according to the terms of the contract.

Oral evidence was admissible for the purpose of identifying the plans and specifications intended by the parties. *Stoops v. Smith*, 100 Mass. 63. If these plans and specifications included all the work done and to be done, and all the materials furnished and to be furnished by the plaintiff, the acts of the parties after this contract was made, and the facts and circumstances under which it was made, were admissible for the purpose of showing that it was intended that the new contract should be substituted for the former ones, and should determine the rights of the parties in regard to the work already done and materials already furnished. Evidence that the parties had abandoned or annulled the former contracts before or at the time they executed the new contract, would be admissible for the same purpose; and it might well be submitted to the jury, under suitable instructions and competent evidence, to determine whether the parties had not annulled the old contracts and substituted the new one therefor, so that it should apply to the work done before as well as after its execution. The evidence would be, in effect, admitted for the purpose of applying the contract to the subject matter of it. *Farnsworth v. Boardman*, 131 Mass. 115.

If the defendant desired more specific instructions on this point than were given, its duty was to ask for them. If any of the evidence admitted was incompetent, the defendant's duty

was to except to it, or in some manner specifically to call the attention of the court to it and request a ruling upon it.

The defendant has not shown by these exceptions that it has been aggrieved, either by the admission of evidence or by the instructions of the court, and there is nothing in this case that induces us to depart from the strict rule which governs exceptions.

The verdict for the plaintiff may well rest upon the second count.

Exceptions overruled.

HENRY HOOPER vs. ELIZA B. BRADBURY.

Essex. Nov. 3, 1881. — Sept. 7, 1882. MORTON, C. J., W. ALLEN & C. ALLEN, JJ., absent.

A testator gave to his wife real and personal property for life, which on her death was to be equally divided between his son and his daughters E. and M.; and the will further provided as follows: "The part coming to E., I wish placed in trust, and at her decease, if she leaves no children, paid to her sister M." After the death of the widow, the executor settled his account in the Probate Court, showing a balance of personal property in his hands to be divided. *Held*, that the will created a valid trust; and that a trustee should be appointed for the personal property only.

APPEAL from a decree of the Probate Court, refusing to grant the petition of the appellant to be appointed trustee of the estate devised by Henry Hooper, for the use and benefit of the appellee, his daughter. Hearing before *Endicott, J.*, who reported the case for the consideration of the full court, in substance as follows:

The petition was disallowed by the Probate Court on the sole ground that the will of the deceased did not create a valid trust, and that no occasion existed for the appointment of a trustee.

The material parts of the will were as follows: "First. I give to my wife Harriet, during her life, the use and occupancy of my dwelling-house, with all the buildings and land attached to the same, together with all the plate, furniture, and all other materials, in and about the house, with liberty to sell the same, if she thinks it is for her and the children's interest.

"Second. I also give my wife Harriet the income of all my property, with liberty to sell the same, if the income is not sufficient for her and the children's support.

"Third. After the decease of my said wife Harriet, all that remains of my property, real and personal, is to be equally divided between my son Henry, Eliza and Mary Susan.

"Fourth. The part coming to Eliza, I wish placed in trust, and at her decease, if she leaves no children, paid to her sister Mary Susan."

The widow of the testator has died, and his executor has settled his account in the Probate Court, showing a balance of personal property in his hands to be divided.

The judge reversed the decree of the Probate Court, and directed that the case be remitted to that court for further proceedings on the petition.

S. B. Ives, Jr., for the appellant.

T. M. Osborne, (*W. D. Northend* with him,) for the appellee.

FIELD, J. The report finds that the executor's accounts show a balance of personal property in his hands to be divided under the third and fourth clauses of the will. It is said in argument, that there is also land devised by these clauses.

The legal effect of the third clause standing alone would be to give to Henry, Eliza and Mary Susan each absolutely one undivided third part of the personal property, and an estate in fee simple in an undivided third part of the real property, provided the testator had an estate in fee simple in it which he could devise. Gen. Sts. c. 92, § 5. *Lincoln v. Lincoln*, 107 Mass. 590. *Crossman v. Field*, 119 Mass. 170.

By the fourth clause it is manifest that the testator intended that "the part coming to Eliza" should be paid or conveyed to Mary Susan at the decease of Eliza, if she left no children. It was the definite failure of children at the decease of Eliza, and not an indefinite failure of issue, that the testator had in mind, and it was at the decease of Eliza that the limitation over to Mary Susan was to take effect, if at all. The two clauses taken together would vest in Eliza an estate in fee simple in land, determinable in the event of her dying leaving no children then alive, with an executory devise over to her sister Mary Susan. *Schmaunz v. Göss*, 132 Mass. 141. *Symmes v. Moulton*,

120 Mass. 343. *Whitcomb v. Taylor*, 122 Mass. 243. *Brightman v. Brightman*, 100 Mass. 238. *Ide v. Ide*, 5 Mass. 500. *Richardson v. Noyes*, 2 Mass. 56. Of such an estate Eliza would have the right of alienation, subject to the executory devise, and would be entitled to the immediate possession and use.

It has been argued that the effect of this construction of the two clauses, if applied to the personal estate, is to give to Eliza the absolute property in that, because it is said that "there is no such thing as an executory devise of personalty after a fee simple." The courts of England, which favor the creation of estates tail by implication, have not always given the same construction to language when applied to personal property as when applied to land. But in *Hall v. Priest*, 6 Gray, 18, 22, this court say, "In a case like the present, where personal and real estate are given by the same clause, and in the same words, and there is nothing to indicate a different intent on the part of the testator, in relation to his personal estate, from that manifested respecting his real estate, we are of opinion that the words are to be construed in the same manner, as applicable to both species of property."

It might perhaps be contended that by the fourth clause, and particularly by the use of the word "paid," the testator had manifested a different intention with regard to the personal estate from that shown in regard to the real, and that he meant to give in his personal estate a life interest to Eliza, with remainder to her children if she died leaving children, and if not, with remainder to her sister Mary Susan; but we are not satisfied that the testator intended to make any distinction in the rights of property given in the real and personal estate.

In *Albee v. Carpenter*, 12 Cush. 382, Chief Justice Shaw says: "We have no doubt that personal property may be given to one for life, with a remainder to another absolutely. But it is a fixed rule of law, that personal property cannot be given to one in tail with remainder over, nor can an executory bequest be made to take effect upon the termination of an estate tail, because it is too remote. *Nightingale v. Burrell*, 15 Pick. 104. It will be found, we believe, in all the cases, that where a gift over of personal estate has been maintained, it is where the gift to the first taker is, by the terms of the bequest, not exceeding a gift for

life. *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243. *Homer v. Shelton*, 2 Met. 194, and the cases there cited." But in *Homer v. Shelton* the interest of the plaintiff in the personal property was that of absolute ownership, determinable on a contingency that must happen, if at all, at his death, with a limitation over, and this, by a majority of the court, was held valid, and the money was ordered to be paid to the plaintiff, to be held by him subject to the limitation.

The want of permanency in the condition of different kinds of personal property has occasioned much difficulty in construing bequests of future interests in chattels personal. Without considering such bequests, and having in view only general bequests of personal property or money, it is the general rule, that, by means of an express trust, personal property may be subjected to any limitations not inconsistent with the rule against perpetuities, and we think it is established that, by or without creating an express trust, an executory bequest of personal property to take effect on a contingency that must happen, if at all, on the death of the first taker, may be a valid bequest. *Homer v. Shelton*, *ubi supra*. *Moffat v. Strong*, 10 Johns. 12. *Condict v. King*, 2 Beas. 375. *Rowe v. White*, 1 C. E. Green, 411. *Tyson v. Blake*, 22 N. Y. 558. *Eichelberger v. Barnetz*, 17 S. & R. 293. The limitation over in bequests of personal property has often been held void by reason of the right of absolute disposal of the property given to the first taker, because the gift over is inconsistent with the rights of property and of control over it first given. *Ide v. Ide*, 5 Mass. 500. *Burbank v. Whitney*, 24 Pick. 146. *Merrill v. Emery*, 10 Pick. 507. *Wells v. Doane*, 3 Gray, 201. *Holmes v. Godson*, 8 DeG., M. & G. 152.

But a gift of a right of property generally, unaccompanied with any right of possession, control and disposal of the property, is not inconsistent with a limitation over on the happening of a future contingency; and, in the case at bar, it is apparent that the testator did not intend that Eliza should have the right to dispose of the principal of the personal property to her own use in her lifetime, and the limitation over cannot be held void on that ground.

In the following cases, the property was given generally, and was ordered by the court to be paid over to the first taker,

without deciding whether the limitation over was valid or not. *Fiske v. Cobb*, 6 Gray, 144. *McCarty v. Cosgrove*, 101 Mass. 124. *Taggard v. Piper*, 118 Mass. 315. *Bradlee v. Appleton*, 16 Gray, 575.

It is indeed said in *Taggard v. Piper*: "We are of opinion that no trust was created by these provisions. The case is governed by *Fiske v. Cobb*, 6 Gray, 144, where it was held that if a legacy is given generally, but subject to a limitation over, on the subsequent condition of the legatee dying without issue, it is to be paid to him without security, unless it is made to appear that there is danger of his wasting, secreting or removing the property. No such question is raised here. It is therefore unnecessary to consider many of the points argued at the bar upon the effect to be given to the provisions of the twelfth clause." The question was whether his share of the personal estate should be paid to William T. Piper or to a trustee, and the court decided that it should be paid to Piper, and did not consider whether or not he would hold the property subject to any trust created by the twelfth clause of the will, because, if he did so hold it, no case was made out for requiring of him security that he would not waste, secrete or remove the property. The expression, "we are of opinion that no trust was created," in the connection in which it is used, must mean that there was no occasion for the appointment of a trustee.

In all general bequests of personal property, where the use of articles *in specie* is not intended to be given, and there are future interests in it which the law recognizes, a trust of some kind is necessarily implied, whether the property remains in the hands of the executors, or is put into the hands of the first taker, or of a trustee strictly so called. In general bequests of money or personal property for life, with remainder over, the legatee takes the interest or income only, and, in the absence of any expressed intention to the contrary, the property is either paid to a trustee or held by the executor as trustee. *Field v. Hitchcock*, 17 Pick. 182. *Homer v. Shelton*, *ubi supra*.

But when the first taker is the owner, subject to a contingent limitation over on the happening of a subsequent event, the money is usually paid to him, because it is his, and the contingency may not occur; but, if there is danger that he will waste

it, security for its preservation may be required for the benefit of the future contingent interest, and, if he will not give the security required, the court would probably appoint a trustee and take the funds out of his hands. *Fiske v. Cobb*, *ubi supra*. *Clarke v. Terry*, 34 Conn. 176. The ground of this distinction in the two cases is the presumed intention of the testator. *Rowe v. White*, 1 C. E. Green, 411. *Pickering v. Pickering*, 4 Myl. & Cr. 289. *Collins v. Collins*, 2 Myl. & K. 703.

And where, in a bequest of personal property generally, with a valid limitation over on the happening of a contingency, it is clearly the intention of the testator that the first taker should not have the possession of the property, but that it should be placed in the hands of a trustee, that intention should be carried out. Such a trust is not novel. The statutes of this Commonwealth provide for the sale and conveyance in fee simple of real estate which is subject to a contingent remainder, executory devise, or power of appointment, and the appointment of a trustee to receive, hold, invest and apply the proceeds of the sale for the benefit of the persons who would have been entitled to the real estate if such sale had not been made. Pub. Sts. c. 120, §§ 19-21. The beneficial owner under such a trust would be entitled to the income until the contingency happened, as the owner of the land would be entitled to the rent, issues and profits of it, and, when the happening of the contingency became impossible, would be entitled absolutely to the fund.

We think that the testator, by the fourth clause of his will, has clearly expressed his intention that a trustee should be appointed. As a trustee of the land is unnecessary, a trustee should be appointed for the personal property only, without considering whether, by the peculiar phraseology of this clause, such was not the intention of the testator.

The decree of the justice of this court, reversing the decree of the Probate Court, must be affirmed, and the cause remitted to the Probate Court for further proceedings, in accordance with this opinion.

Ordered accordingly.

ALONZO P. WOODRUFF vs. FREDERICK B. WENTWORTH.

Suffolk. March 2, 1881; March 9. — Sept. 7, 1882. ENDICOTT & DEVENS, JJ., absent.

- A declaration alleged that the defendant agreed to pay the plaintiff a certain sum, in consideration that the plaintiff would assent to the election of a certain person as manager, in the defendant's place, of a corporation of which the plaintiff and defendant were both members. The evidence introduced at the trial showed that the consideration of the defendant's promise was that the plaintiff would vote for the person named as manager, and would also vote to increase the salaries of the officers of the corporation. *Held*, that there was a variance between the declaration and proof in regard to the consideration.
- A contract between two stockholders in a corporation, by the terms of which one, in consideration of a sum of money paid to him by the other, agrees to vote for a certain person as manager of the corporation, and also to vote to increase the salaries of the officers of the corporation, including that of the manager, is void as against public policy, unless it is assented to by all the stockholders of the corporation; and whether it is valid if so assented to, *quære*.
- A declaration alleged that, in consideration that the plaintiff would do a certain act in relation to a corporation, of which the plaintiff and the defendant were both members, the defendant agreed to pay the plaintiff a sum named when certain bonuses were paid to the defendant by the corporation; that the plaintiff did the act, and the bonuses were paid to the defendant by the corporation; and that the defendant refused to pay the plaintiff the sum promised. The evidence introduced at the trial showed that the defendant assigned the bonuses to a person, to whom the corporation paid a portion of the amount due thereon; that the assignee sold the bonuses remaining for a sum less than the balance due; and that the purchaser was paid the full amount of such balance by the treasurer of the corporation, to whom, according to a previous agreement between them, the purchaser paid the difference between the total value of the bonuses and the whole amount paid to the assignee. The judge instructed the jury, that, if they found that the corporation actually paid the whole amount of the bonuses to any assignee of the defendant, this was such a payment of the bonuses to the defendant that the action could be maintained; but that, if they found that the corporation had not paid the bonuses in full, but had succeeded by any means in purchasing them for a sum less than was due upon them, then that would not be such a payment of them as would sustain the action. *Held*, that the defendant had no ground of exception.

CONTRACT. The declaration was as follows: "And the plaintiff says that the defendant, on or about the tenth day of October 1878, in consideration that the plaintiff would assent to the election of William H. Pray as manager of the American Carpet Lining Company, in the defendant's place, upon the sale by the defendant of his stock in said American Carpet Lining Company, a corporation duly established under the laws of this Commonwealth, whereof the plaintiff and the defendant were

members, promised and agreed with the plaintiff to pay him the sum of \$500 when certain bonuses were paid to the defendant by said company; and that thereupon the plaintiff gave his assent to said election, and said stock was sold, and said Pray was elected, and said bonuses were paid said defendant by said company and before the beginning of this suit; but that the defendant refused, and still refuses, to pay the plaintiff said \$500, or any part thereof, though often thereto requested." The answer contained a general denial; alleged that the agreement declared on, if proved, was void as against public policy; and set up want of consideration. Trial in the Superior Court, before *Allen, J.*, who allowed a bill of exceptions, in substance as follows:

The plaintiff introduced evidence tending to show that, before and at the time of making the alleged agreement, the plaintiff and the defendant were stockholders in, and officers of, the American Carpet Lining Company, a corporation established under the laws of this Commonwealth, the plaintiff being clerk and the defendant manager. All the other stockholders of the corporation at that time were E. H. Bailey, who was the treasurer, and George W. Chipman, who was the president. The plaintiff and Bailey each held a sufficient number of shares to be able separately, under the by-laws of the corporation, to prevent the election of any officer thereof. A short time before the alleged promise was made by the defendant, he had agreed with one Pray to sell to Pray the chief part of his interest in the company, and one of the terms of the sale was that the defendant should resign as manager, and Pray should be elected manager in his place, with a salary of \$3000. The defendant had considerable experience in the business carried on by the company, but Pray was comparatively inexperienced. The plaintiff believed his interests would suffer by the substitution of an inexperienced for an experienced manager, and refused to assent to the change unless he should receive some compensation therefor.

The plaintiff authorized Bailey, the treasurer of the company, to make a satisfactory arrangement with the defendant. Bailey was unwilling to assent to the resignation of the defendant as manager and the election of Pray in his place, unless the salaries of the officers of the company were increased. The salary of the manager was then \$2500. Bailey made an arrangement

with the defendant, and the plaintiff, in consequence thereof, voted for the election of Pray as manager. Bailey and Chipman, the other members of the corporation, knew at the time that the plaintiff voted for the election of Pray as manager in consequence of promises made to him by the defendant, and assented thereto. The alleged promise was not made by the defendant to the plaintiff personally, but was made to Bailey, the plaintiff's agent. Bailey testified for the plaintiff, among other things, that the defendant agreed to pay the plaintiff \$500 if the plaintiff would vote for the election of Pray as manager in the place of the defendant, said payment to be made so soon as the company should pay the defendant certain bonuses, amounting to the sum of \$10,000, which they had agreed to pay him; and that the plaintiff did so vote in consequence of this promise. Upon cross-examination, Bailey testified that a further consideration for the promise alleged to have been made by the defendant was, that the plaintiff should vote for the increase of the salaries of the president, treasurer, clerk and manager of the corporation; and that the plaintiff did vote for such increase of salaries, and the salaries were actually raised by said vote. Upon cross-examination, the defendant admitted that the bonuses sold to Pray had been settled for by the latter.

Bailey also testified, that the time when the bonuses owing to the defendant from the corporation were to be paid was largely dependent upon his discretion as treasurer; that the defendant assigned said bonuses to Pray; that the company paid Pray \$4000 upon them in January 1879; that afterwards Pray asked him to procure a purchaser for the \$6000 worth of bonuses remaining unpaid; that he, Bailey, procured his father to purchase the unpaid bonuses for \$5000; that it was understood between him and his father that he should receive \$1000 when the company paid the \$6000 due upon the bonuses; that thereafter he, as treasurer of the company, did, on or before August 8, 1879, pay to his father the full amount due upon the bonuses, and received from the money so paid \$1000 for his own use.

Pray was called as a witness by the defendant, and testified that he bought the bonuses of the defendant before the day the alleged promise was made, but that the written assignment of them was not made until about a month after the day of the

alleged promise; that he received \$4000 upon them from the company in January 1879; that he afterwards frequently requested Bailey to pay the remaining \$6000, but could get no definite answer from him; that, in June or July 1879, he asked Bailey to procure for him a purchaser of the bonuses; and that afterwards, at Bailey's request, he transferred the bonuses to Bailey's father, and received, in payment for the transfer, \$5000.

The defendant requested the judge to rule that the plaintiff had not alleged or proved any legal consideration for the alleged promise of the defendant to pay \$500, and could not recover in this action. The judge refused so to rule, and instructed the jury that, if all the members of the corporation knew and assented thereto at the time of Pray's election, and the plaintiff had, in consideration of the defendant's promise, agreed to vote for the election of Pray, the promise by the plaintiff so to vote was a good and valid consideration to support the alleged promise of the defendant.

The defendant also asked the judge to instruct the jury as follows: "If the jury find that the bonuses were transferred by Pray to the father of Bailey, the treasurer of the American Carpet Lining Company, for \$1000 less than the amount then due upon them from said corporation, and that there was an understanding between Bailey and his father that Bailey should have the amount paid by the corporation over and above the amount paid for the bonuses by the father, and that thereafter Bailey, as treasurer, paid the full amount due upon said bonuses, and received for his own use \$1000 of the money thus paid, this was not a payment of the bonuses to the defendant, such as will permit the plaintiff to recover under the declaration."

The judge declined to give the instruction requested; but instructed the jury that, if they found that the company actually paid the whole amount of the bonuses to any assignee of the defendant, this was such a payment of the bonuses to the defendant that this action, so far as it depended upon this part of the case, could be maintained; but that if they found that the company had not paid the bonuses in full, but had succeeded by any means in purchasing them for a less sum than was due upon them, then that would not be such a payment of them as would sustain this action.

Upon the request of the plaintiff, the judge further instructed the jury, "that if any consideration other than the one declared upon is shown to have been actually paid or received, this is not a variance which prevents the plaintiff's recovery, but the action may still be maintained."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar in March 1881, by *S. A. B. Abbott*, for the defendant, and by *J. Willard*, for the plaintiff; and was reargued in March 1882, by *J. G. Abbott & S. A. B. Abbott*, for the defendant, and by *Willard*, for the plaintiff.

FIELD, J. The instruction to the jury, "that if any consideration other than the one declared upon is shown to have been actually paid or received, this is not a variance which prevents the plaintiff's recovery, but the action may still be maintained," was erroneous. The consideration must be proved as alleged. *Stone v. White*, 8 Gray, 589.

The declaration alleged that the defendant's promise was "in consideration that the plaintiff would assent to the election of William H. Pray as manager of the American Carpet Lining Company, in the defendant's place," &c. There was evidence that the consideration of the defendant's promise was that the plaintiff would vote for the election of Pray as the manager, and also would vote to increase the salaries of the president, treasurer, clerk and manager. If this was the contract between the parties, the defendant would not be liable unless the plaintiff proved that he had done both these things. The declaration does not describe any such contract, and it does not correctly allege either the whole consideration proved or any part of it.

The necessity of proving the consideration of the promise of the defendant, as laid in the declaration, must be distinguished from the necessity of alleging everything that is promised by the defendant. *Brackett v. Evans*, 1 Cush. 79. Neither can an amendment to the declaration after verdict be permitted in this case, as was done in *Cleaves v. Lord*, 3 Gray, 66, in *Stone v. White*, *ubi supra*, and in many other cases.

The agreement of the plaintiff, as stockholder in a private business corporation, to vote for Pray as manager, and to vote to increase the salaries of the officers, including that of the

manager, was void as against public policy, unless it was consented to by all the stockholders of the corporation. *Guernsey v. Cook*, 120 Mass. 501.

Whether it was not void as against public policy, even if all the stockholders consented to it, is a question of great difficulty; and even if the consent of all the stockholders to the making of it would render it valid, whether their assent to the plaintiff's voting, after they had knowledge that he had made it, would render it valid, although it was not made for them or in their interest, and was made without their knowledge, would require careful consideration. As it is not absolutely necessary to decide these questions in order to dispose of these exceptions, and as the exact facts in regard to the assent of the other stockholders to the plaintiff's voting for Pray as manager, pursuant to his agreement, do not appear in the exceptions, we express no opinion upon them.

It does not appear that the agreement of the plaintiff to vote to increase the salaries was made with the consent of the other stockholders, or was known to them, and no instructions appear to have been given to the jury upon this part of the consideration; and, under the instructions of the court, that the action could be maintained upon any other consideration than the one declared on, the jury may have found their verdict for the plaintiff solely on the ground of the executed agreement of the plaintiff to vote to increase the salaries as a consideration of the promise of the defendant. Besides, if this agreement was a part of the consideration of the defendant's promise, and was void as against public policy, it taints the whole contract. The promise of the defendant was single and indivisible, and the illegal part of the contract cannot be separated from the rest. *Perkins v. Cummings*, 2 Gray, 258.

We do not understand what the "bonuses" are which are mentioned in the exceptions, but it has been assumed by both parties at the argument that they were something valuable, which could lawfully be sold and assigned. The instruction of the court, upon what constituted a payment of the bonuses by the company, was sufficiently favorable to the defendant.

Exceptions sustained.

EBEN M. HAMOR & another, executors, vs. EASTERN RAILROAD COMPANY & others.

Suffolk. May 26. — Sept. 27, 1882. ENDICOTT, LORD & W. ALLEN, JJ., absent.

A secured creditor of the Eastern Railroad Company is not entitled, after the lapse of four years from the enactment of the St. of 1876, c. 236, and five years from the time to which, by the terms of the statute, the claims against the corporation were to be made up as cash, to present his claim for adjustment and to receive certificates of indebtedness therefor, he having in the mean time received interest on his debt at a greater rate than he would have received under such certificates.

BILL IN EQUITY, by the executors of the will of Tobias Roberts, against the Eastern Railroad Company and the trustees of the same, appointed under the St. of 1876, c. 236, to compel the issue and delivery to the plaintiffs of certificates of indebtedness, as provided in that statute. Hearing upon bill and answer before *Field, J.*, who reserved the case for the determination of the full court; such decree to be entered as justice might require. The facts appear in the opinion.

F. I. Amory, for the plaintiffs.

R. Olney, for the defendants.

FIELD, J. Whether a secured creditor of the Eastern Railroad Company had the right, under the St. of 1876, c. 236, to surrender his security, and receive certificates of indebtedness issued under that act for the full amount of his debt made up as cash to the first day of September 1876, was not decided in *Merchants' National Bank v. Eastern Railroad*, 124 Mass. 518. In that case, the prayer of the bill was "that the plaintiff might receive certificates of indebtedness for its whole debt and retain such collateral security; or might be allowed to sell the collateral security and receive certificates for the balance;" and the defendant demurred on this ground, among others, that "the plaintiff was entitled to receive certificates of indebtedness only upon the surrender of the collateral security." The demurrer was overruled, and it was said in the opinion that the amount for which creditors partly secured may receive certificates "must be limited to the remainder of the debt, after the value of the securities, ascertained as authorized by the original contract, or

by the subsequent agreement of the parties, or under the supervision of the court, shall have been applied in part satisfaction." The effect of this decision was that a secured creditor was not compelled to surrender his security in order to be entitled to receive certificates, but might receive certificates for the remainder of his debt after deducting the value of his security; but the case called for no decision upon the right of a creditor to surrender his security and receive certificates for the whole of his debt.

In the case at bar, the creditor desires to surrender his security and receive certificates for his whole debt; and one of the contentions of the defendant is that he cannot be permitted to do this, but must deduct the value of his security, and is only entitled to receive certificates for the amount of the indebtedness reduced by this value. We have not found it necessary to decide this question. The certificates of indebtedness which the corporation was authorized to issue by the St. of 1876, c. 236, were "payable in thirty years ending the first day of September, nineteen hundred and six," "with coupons for the payment of semiannual interest thereon," and "the interest on said certificates of indebtedness for the first three years after the first day of September, eighteen hundred and seventy-six, shall be at the rate of three and one half per centum per annum in gold, and for the next three years, at the rate of four and one half per centum per annum in gold, and after six years from said first day of September, at the rate of six per centum per annum in gold." § 3.

The bill alleges that the mortgage authorized by said act was duly executed and delivered to the trustees on June 22, 1876, and that the indebtedness to the plaintiffs' testator "was duly set forth in the schedule made up and deposited with said trustees by said Eastern Railroad, in accordance with the provisions of the fifth section of said act; and that the validity and amount of the plaintiff's claim in respect thereof is admitted as well by said Eastern Railroad Company as by said trustees." It is not alleged in terms that the trustees have "adjusted" the amount of this indebtedness. The fifth section of the act provides that the "said trustees shall forthwith, from time to time, adjust with the several creditors of said corporation the amount of their

several debts and claims," which "shall be made up as cash, with addition or rebate of interest, as the case may be, to the first day of September, in the year of our Lord one thousand eight hundred and seventy six," "and the amount so determined shall be the sum for which each creditor holding such adjusted and ascertained claim, shall be entitled to receive an equal amount of certificates of indebtedness issued under this act; and said trustees shall set apart and hold an amount of such certificates of indebtedness equal to such claims, to be at any time exchanged for the existing debts and obligations of said corporation."

The bill, which was filed March 5, 1881, alleges that "at the time of the passing of the act hereinafter mentioned, the said Eastern Railroad Company was indebted to the estate of said Tobias Roberts in the sum of \$8500, and interest thereon at the rate of six per cent from October 1, 1875; that said indebtedness was and still is secured by a mortgage of certain real estate in East Eden; that the said Eastern Railroad Company has paid no part of the principal of said indebtedness, but has from time to time paid the interest thereon, and that said interest has been paid up to the first day of October 1880; that said real estate thus mortgaged does not form an integral part of said Eastern Railroad, and is not required for railroad purposes." It does not appear when the principal sum of the indebtedness becomes or became payable.

The answer admits the allegations of the bill, and, among other things, avers that "the said plaintiffs have either waived and lost their right to claim certificates of indebtedness altogether, or are now entitled to claim them only upon condition of refunding the interest so as aforesaid received by them."

The mortgage of its property, which the Eastern Railroad Company was by the St. of 1876, c. 236, authorized to execute, was necessarily subject to all liens and incumbrances then existing. That act did not impair the obligation of contracts, or affect the rights of any creditor who did not choose to avail himself of its provisions. If any creditor chose to receive certificates for his debt in accordance with the terms of the act, the certificates were received as payment of the debt. The value of the certificates in the market must necessarily vary from time to time, as well as the value of the original security which any creditor

might hold. A creditor had the right to determine for himself whether he would rely on the original contract of indebtedness and any security he might have therefor, or receive in discharge thereof certificates of indebtedness pursuant to the provisions of the act. Apparently, the plaintiffs' testator, or the plaintiffs themselves, until some time after October 1, 1880, determined not to present their claim to be adjusted under the provisions of the act, and to receive certificates in exchange therefor, but chose to rely upon their security and the original obligation of the defendant railroad company, and they meanwhile regularly received interest at the rate of six per centum per annum. This is more than four years after the execution of the mortgage, and is more than five years after the time to which by the terms of the act the claims were to be made up as cash. It is not alleged in the bill, that notice was not published as required by the second section of the act, or that, during the whole time, the plaintiffs or their testator had not full knowledge of the execution of the mortgage to the trustees, and of their right to avail themselves of the provisions of the act. No reason is given why application to the trustees for certificates of indebtedness was not made earlier. Perhaps it should appear affirmatively that such notice was given, or that the plaintiffs or their testator had such knowledge, but the case has not been argued on any ground of want of notice or knowledge on the part of the plaintiffs, but has been put upon the ground that it is the absolute duty of the trustees to issue certificates of indebtedness at any time when application is made, if the claim is not disputed, or, if not at any time, certainly within the time and under the circumstances stated in the bill.

The trust created under this act is not like an ordinary trust for creditors, which contemplates only payment in money to the creditors, under which it is impossible that any creditor should receive more than the full amount of his debt. In this case, the payments are in certificates of indebtedness, payable on long time with specific rates of interest, which certificates in form, as set out in the bill, are negotiable instruments. Such certificates may at any time be of greater value in the market than the indebtedness for which they are issued. The obligation of the corporation, under the certificates issued to any creditor, may be

more onerous than the original obligation. It may well be that all the creditors who have received certificates received them at a time when they were worth in the market less than par, and it may be that, by the successful management of the railroad, under a board of directors elected pursuant to the eleventh section of the act, by which the holders of certificates are authorized to elect six out of nine directors, the market value of these certificates has risen considerably above par, so that by the receipt of certificates now in exchange for a debt, and the immediate sale of the certificates, a sum of money could be obtained considerably larger than the sum actually due under the original contract. Although the right on the part of the holders of certificates to elect six directors ceases when the amount of outstanding certificates is reduced to ten millions of dollars, and, on the due payment and satisfaction of all the obligations of the railroad company secured by the mortgage, the railroad company becomes entitled to all the mortgaged property and its additions, yet, on the absolute foreclosure of the mortgage, the holders of the certificates have the right to organize themselves into a corporation which shall be invested with the franchises of the Eastern Railroad Company, and be entitled to receive a conveyance of the property mortgaged. §§ 16, 17. The holders of the certificates, therefore, have, or may have, valuable rights in the management of the corporation.

It is manifest that, under such a trust, one secured creditor cannot lie by indefinitely, and insist on the corporation performing its original obligation to him, leaving to other creditors the risk of extricating from its embarrassments, by the scheme provided by the act, a corporation possibly insolvent, and, when success seems assured and the risk of loss has vanished, have the right to be admitted to the benefits which, without his aid, other creditors have secured. It is true there is no time expressed in the act within which creditors must present their claims for adjustment and elect to receive the certificates, if such claim be included in the schedule deposited with the trustees by the corporation and admitted by the trustees; and the corporation by the execution of the mortgage as authorized by the act must be held to have accepted the act, and to have intended that all its creditors, if they chose, might come in under the act and receive

certificates in accordance with its provisions. But such a trust cannot be held to be one always open for the assent of any creditor, to be manifested at any time and under any circumstances. A creditor ought not to be permitted to speculate unreasonably upon the advantages or disadvantages of coming in under such a trust. The receipt of the interest at the rate of six per centum per annum after September 1, 1876, while the holders of certificates were entitled to interest at the rate, first, of three and one half, and then of four and one half per centum, is strong, if not conclusive, evidence of an election on the part of this creditor not to avail himself of the provisions of the act.

The provision of the statute, that "the debts so adjusted shall be made up as cash, with addition or rebate of interest, as the case may be, to the first day of September, in the year of our Lord one thousand eight hundred and seventy-six," is merely an adoption of the ordinary provision for making up the amount of claims found in statutes relating to bankruptcy or insolvency, and has no tendency to show that the corporation might, after that time, go on paying interest, and the creditor receiving it, according to the original contract of indebtedness, and yet the creditor retain the right at any time to receive certificates as of September 1, 1876, by deducting or paying back the interest received after that date. A rebate of interest is a discount or abatement of interest on sums of money not yet due and payable, not a payment back of interest due and paid.

If any implication at all is to be drawn from this provision, it is that the act was not intended to apply to claims in which the creditor, relying on the original obligation of the corporation, had deliberately chosen to receive interest thereon after September 1, 1876. But it is not necessary to give any such construction to the act; it is enough to hold, as we do, that the right of a creditor to elect to come in under the act, and receive certificates in payment of his debt, is one that must be exercised within a reasonable time, under the circumstances of the particular case, and that the plaintiffs have not stated such a case as entitles them to compel the trustees now to accept a surrender of their securities and to issue to them certificates of indebtedness.

Bill dismissed.

DWIGHT FOSTER & others vs. BOARD OF PARK COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. Sept. 9, 1881. — Sept. 7, 1882. C. ALLEN, J., did not sit.

The St. of 1875, c. 185, authorized a board of park commissioners to locate and lay out within the city of Boston a public park, to take such lands as the board should deem desirable therefor, and to assess upon any real estate in Boston, which, in the opinion of the board, should receive any benefit and advantage from such locating and laying out, beyond the general advantages to all real estate in the city, "a proportional share of the expense of such location and laying out," the entire amount so assessed upon any estate not to exceed one half of the amount adjudged by the board to be the whole benefit received by it. The board purchased a large tract of flats, over part of which the tide flowed, the rest being marsh, and proceeded to lay out avenues and to fill them with gravel; and, when but a small portion of the area was filled, and none of the avenues were completed, passed an order declaring that they had taken, and did thereby take and create, as a public park, certain land, being in fact that already purchased, and also passed a further order reciting that, whereas by the previous order a park was located and laid out, they laid an assessment upon certain lands benefited thereby. This assessment was in fact less than the sums which had then been expended for the purchase of the land and for the filling already done. *Held*, on a petition for a writ of certiorari, by the owners of estates so assessed, to quash the assessment, that the park was laid out, within the statute; and that the court could not say, as matter of law, that the estates of the petitioners had not been benefited by what had been done at the time the assessment was made.

PETITION for a writ of certiorari to quash an order of the board of park commissioners of the city of Boston under the St. of 1875, c. 185,* assessing lands of the petitioners and others for

* By §§ 1, 2, the mayor of the city of Boston is authorized, with the approval of the city council, forthwith to appoint three commissioners, who shall constitute a board of park commissioners.

By § 3, "said board shall have power to locate within the limits of the city of Boston one or more public parks; and for that purpose, from time to time, to take in fee, by purchase or otherwise, any and all such lands as said board may deem desirable therefor; or to take bonds for the conveyance thereof to said city; to lay out, improve, govern and regulate any such park or parks, and the use thereof; to make rules for the use and government thereof;" "and generally to do all needful acts for the proper execution of the powers and duties granted to or imposed upon said city, or said board, by this act: provided, however, that no land shall be taken, or other thing involving an expenditure of money done, until an appropriation, sufficient to cover the estimated expense thereof, shall have been made by a vote of two thirds of each branch of the city council of said city."

By § 4, the board shall, within sixty days of the taking of any land under the statute, file a description thereof in the registry of deeds. By § 5, the

special benefits received from the locating and laying out of a park. The record showed the following facts:

By an order of the city council, passed by vote of more than two thirds of each branch, and approved by the mayor on July 23, 1877, the treasurer was authorized to borrow, under the direction of the committee on finance, the sum of \$450,000, "to be expended by the park commissioners in the purchase of not less than one hundred acres of land or flats" within certain boundaries in the Back Bay, so called; and by another order, approved on December 24, 1877, the park commissioners were authorized "to complete the purchase of any part or parts of the said tract, upon the terms provided in the said order, at such times as they shall deem expedient." By an order of the city council, approved November 21, 1879, the park commissioners were authorized, so

board shall estimate and determine all damages sustained by the taking of land, or other acts of the board in the execution of its powers; but any party aggrieved by such determination may have his damages assessed by a jury in the Superior Court, as in the case of "damages sustained by reason of the laying out of ways in the city of Boston." By § 6, the fee of all lands taken or purchased by the board shall vest in the city of Boston; the city shall be liable to pay all damages assessed or determined as provided in § 5, and all other costs and expenses incurred by the board in the execution of its powers; and is also authorized "to take and hold in trust or otherwise any devise, grant, gift or bequest that may be made for the purpose of laying out, improving or ornamenting any parks in said city."

By § 7, "any real estate in the city of Boston, which in the opinion of said board shall receive any benefit and advantage from the locating and laying out of a park under the provisions of this act, beyond the general advantages to all real estate in the city of Boston, may, after like notice to all parties interested as is provided by law to be given by the street commissioners of the city of Boston in cases of laying out streets in said city, be assessed by said board for a proportional share of the expense of such location and laying out: provided, that the entire amount so assessed upon any estate shall not exceed one half of the amount which said board shall adjudge to be the whole benefit received by it.

By § 8, "no assessment shall be made as provided in the preceding section, except within two years after the passage of the order, the execution of which causes the benefit for which the assessment is made." By the subsequent sections, all assessments made under this statute shall constitute a lien upon the real estate so assessed; and any party aggrieved by any assessment may have the amount of the benefit received by his estate assessed by a jury, as in the case of the laying out of ways in Boston.

far as the assent of the city council might be necessary thereto, to exercise their power of taking land for the proposed park. Before December 27, 1879, about one hundred and five acres of land and flats were purchased by the park commissioners, were conveyed to the city by deeds duly recorded, and were paid for by the city.

On December 18, 1879, the board of park commissioners passed an order, reciting that, in the opinion of the board, it was "desirable that a parcel of land belonging to the city of Boston" (then follows a description of the land and flats aforesaid) and certain parcels owned by other parties (likewise described) "should be taken and laid out as a public park," and directing notice to all persons interested "that this board intend to take the lands before mentioned, and lay out the same as a public park," and to assess a portion of the expense thereof upon the estates that will be benefited by "the said proposed laying out of said park," and that any objections "to said taking and laying out or to said assessment" would be heard on December 26, 1879.

On the day so appointed, a hearing was had accordingly, at which no one appeared to object to the taking and laying out as a public park of the lands described in the notice, but objections were made by several persons to assessments of betterments; and, on December 27, 1879, the board of park commissioners passed the following orders for taking the lands for a public park and assessing betterments therefor:

First. An order stating that the commissioners, "by the authority conferred upon us by the said act, and by the city council of said city of Boston, which has made the appropriation necessary to cover the estimated expenses of our action in the premises, have taken, and hereby do take and create as a public park or parks, the following described parcels of land, with all the buildings and fixtures thereon, situated in the said city of Boston, viz." (then followed descriptions of the lands,) "to have and to hold the said several parcels of land to the said city of Boston, its successors and assigns, to its and their sole use and benefit forever, agreeably to the provisions of said act."

Second. "Whereas, pursuant to an act of this board passed December 27, 1879, a public park or parks was located and laid

out in the city of Boston at an estimated expense of \$465,226.10: and whereas, in the opinion of the board, the estates named in the foregoing schedule have been benefited by the location or laying out of said park or parks, and due notice has been given of the intention of the board to assess betterments thereon; it is therefore hereby voted, that the estates named in the schedule be, and they hereby are, respectively charged with the sums therein severally set against them, such sums so assessed not exceeding one half the amount of the adjudged benefit to the estates by the said location and laying out."

The schedule prefixed to the last order is entitled "Schedule of assessments made by the board of park commissioners upon the estates benefited by the locating and laying out of a public park or parks in the city of Boston, as authorized and enacted by a resolve and act of the board, passed December 27, 1879, the expense of which was estimated at the time of the passage of said location and laying out at \$465,226.10." The schedule consists of five columns, successively showing the number of each lot on a plan, its approximate area in feet, its owner, its boundaries, and the amount assessed upon it; and includes lands owned by the petitioners.

The respondents, in the answer originally filed by them to the petition for a writ of certiorari, stated that, in making the several assessments upon the estates described in the schedule, they assessed upon each estate one half of the amount which the board adjudged to be the whole benefit received by it from the locating and laying out of the park; and they were allowed to amend their record accordingly, by inserting in the schedule of assessments a column showing the whole amount of benefit and advantage that these estates had respectively received by said location and laying out, as then adjudged, by which it appeared that this amount was, as to each estate, exactly twice the amount of the assessment upon it.

Upon this record, the court decided that the St. of 1875, c. 185, did not authorize any assessment to be laid except for the amount of expenses which had either been actually paid, or had been so far incurred that the city was under a liability to pay from which it could not escape; and the case was ordered to stand for further hearing before a single justice, to

give the respondents an opportunity to show that the city had paid or become liable for the amount assessed. 131 Mass. 225, 230.

A further hearing was accordingly had before a single justice, at which it was agreed that the respondents had, under the orders of the city council, previously to December 27, 1879, expended on account of the park the sum of \$551,454.06, of which sum \$439,690.90 was expended for the purchase of land, and \$108,015.42 for filling, grading, and contingent expenses, and \$3747.74, for surveying and plans. It further appeared from a plan used at the hearing, that, when the assessment was laid, certain avenues had been filled with loose gravel and ashes, the upper surface of which was from four to ten feet below the grade finally intended for the avenues, and was level, but not smoothed or in any way or respect prepared for public use; that the area filled was but a small portion of the entire territory, and that the filling done was pursuant to a plan previously filed. There were also creeks and mud flats over which the tide ebbed and flowed, and outside of these creeks, except where the avenues had been filled as above stated, the land was a sedgy marsh in its natural state, covered occasionally by the high tide.

At the request of both parties, the case was reserved for the consideration of the full court, and for the entry of such order or judgment as law and justice might require.

D. Foster & H. D. Hyde, for the petitioners.

H. W. Putnam, for parties having similar interests, was permitted to file a brief in support of the petition.

E. P. Nettleton, for the respondents.

FIELD, J. The petitioners ask that the order of the park commissioners laying an assessment may be quashed, on this ground among others, that at the time of the passage of the order the park was not in any sense constructed so as to be fit for public use as a park. It appears, indeed, by the record of the park commissioners, that a park had been located and laid out; but the petitioners contend that it is competent for them to show by evidence that the park had not in fact been laid out within the meaning of the words "laying out" contained in the statute, and that the facts agreed show this; that the taking of the land and calling it a public park are not laying out a park within

the meaning of the statute, and that the assessment for benefits cannot be made before the order laying out a park has been executed by the construction of the park.

The St. of 1875, c. 185, however difficult it may be to construe, is largely made up of words and clauses that have been used in previous statutes relating to similar subjects. The St. of 1874, c. 97, which is "An act to provide for a public park in the city of Somerville," is, however, more explicit than the St. of 1875, c. 185, in the matter of assessment for benefits. Section 3 provides that, "at any time within two years after the land is purchased or taken under this act, the city council" may assess "a proportional share of the cost of the land so purchased or taken, and of the expense of laying out, grading and making said park; but in no case shall the assessment exceed one half of the amount of such adjudged benefit and advantage. Nor shall the same be made until the work of laying out, grading and making said park is completed." This statute was held to be constitutional in *Holt v. City Council of Somerville*, 127 Mass. 408.

The St. of 1871, c. 382, § 1, provides that, "at any time within two years after any street, highway or other way is laid out, altered, widened, graded or discontinued," the board of city or town officers may assess "a proportional share of the expense of laying out, alteration, widening, grading or discontinuance; but in no case shall the assessment exceed one half the amount of such adjudged benefit and advantage, nor shall the same be made until the work of laying out, altering, widening and grading is completed or discontinuance made."

The St. of 1869, c. 367, § 1, required that "such assessment shall be laid within two years after the passage of the order for the laying out, widening, extending, discontinuing, grading or altering, and not afterwards." The St. of 1869, c. 169, extended the St. of 1866, c. 174, and the St. of 1868, c. 276, to all towns of the Commonwealth which by vote should accept the act, and to all cities which had accepted or should thereafter accept the St. of 1868, c. 75; and in § 1 provided that "no assessments shall be made under the provisions of said acts until the work of laying out, altering, widening and improving any street or way shall be completed."

The St. of 1868, c. 276, and the St. of 1866, c. 174, both provided that in the city of Boston the board of aldermen may assess upon each estate a proportional share of the expense of laying out, widening or discontinuing, grading or altering streets, not exceeding one half the amount of the "adjudged benefit and advantage;" but in neither statute was there any provision that the assessment should not be made until the work was completed, or should be made within any specified limit of time. These conditions were imposed, the first by the St. of 1869, c. 169, and the second by the St. of 1869, c. 367.

Chase v. Aldermen of Springfield, 119 Mass. 556, and *Lincoln v. Worcester*, 122 Mass. 119, both arose under the St. of 1871, c. 382, which required the work of laying out, altering, widening and grading to be completed before the assessment could be made.

Hitchcock v. Aldermen of Springfield, 121 Mass. 382, arose under the St. of 1871, c. 382, and decides that "within the meaning of this statute, a street is 'laid out, altered, graded,' &c., when the order to lay out, alter or grade is passed by the competent authority. The date of the passage of such an order fixes the time from which the rights of the parties are to be determined, and when the limitation of two years begins to run."

Whiting v. Mayor & Aldermen of Boston, 106 Mass. 89, arose under the St. of 1865, c. 159. Section 6 of this act provides that "the whole expense of the said widening, including the damages mentioned in the third section of this act, and the net expense of grading the whole widened street, after deducting the estimated net proceeds of the earth and gravel removed, shall be assessed upon all the estates abutting upon the said widened street, in proportion to their value, as they shall be appraised by the mayor and aldermen, when the improvements have been made." Two questions, among others, were decided in this case, which have a resemblance to some of the objections to the assessment taken in the case at bar. The court say: "The objection that sidewalks had not been laid is not sufficient to impeach the assessment as premature. If sidewalks are necessary to the proper completion of the street for public use, the city is not discharged of its obligation to provide them. The work which the statute contemplated is that of 'grading the whole

widened street.' There has been, undeniably, a substantial performance of this work. We think it was competent for the mayor and aldermen to proceed to assess the expenses of laying out and grading the street, leaving the work of completing and fitting it for convenience of the public use to be done in the ordinary mode of superintendence of streets. The plaintiffs are not prejudiced by such action, as it lessens the expense to be assessed upon abutters." 106 Mass. 96. Again, on page 98, the court say: "The statute provides that the whole expense shall be assessed. The order of apportionment directs that a certain amount be assessed, 'being for the payment of a portion of the expense.' The amount named in the order does not appear to be greater than the net expense, ascertained as required by the statute. Upon the papers exhibited it seems to be less; and it is claimed to be so by the defendants. The plaintiffs cannot reasonably complain of this; and it is not an uncertainty in the order, nor a departure from the statute which can affect the validity of the order."

Prince v. Boston, 111 Mass. 226, arose under the St. of 1866, c. 174, and it was decided that the assessment of the betterments might be laid after the widening of the street. The court say: "But we have recently decided that an assessment of this kind is necessarily subsequent to the widening. From the nature of the case it cannot be made until the completion of the work. One element in the apportionment, the net expense of grading the whole widened street, cannot be sooner ascertained." 111 Mass. 230. And again, on page 231: "It is therefore not only unnecessary, but it is also impossible, that the assessment of the expenses among the persons who have derived benefit from the improvement should be contemporaneous with, and make a part of, the original adjudication widening the street and awarding damages."

Jones v. Aldermen of Boston, 104 Mass. 461, contains four cases, two of which arose under the St. of 1866, c. 174, and two under that statute as amended by the St. of 1868, c. 276. The court say, on page 465: "The right of the petitioners to damages, and their liability to be assessed for benefits received by the widening, accrued at the time of the widening. The assessment of the damages, and the adjudication of the amount of benefit

which has been received, must of necessity be made at some time subsequent to the widening. But they merely declare the damages sustained, or the benefit received, by and at the time of the widening. The liability to assessment is not created by the adjudication of the aldermen, but by the fact that benefit is received from the widening; and it accrues at the time of the widening, and is to be estimated as of that date. *Whitman v. Boston & Maine Railroad*, 7 Allen, 313. *Meacham v. Fitchburg Railroad*, 4 Cush. 291. *Parks v. Boston*, 15 Pick. 198."

Chase v. Aldermen of Springfield, 119 Mass. 556, arose under the St. of 1871, c. 382. The court say, on page 562: "The objection 'because no grade line has been established,' is not well founded. The statutes do not require that such a line shall be formally established and defined upon the record of the proceedings, except so far as may be necessary to a proper specification of the manner in which the new highway or alteration shall be made. Gen. Sts. c. 43, § 13. So far as the rights or liabilities of abutters are affected by the grade of the street, they depend on and are determined by the grade as actually constructed." In this case the record of the board of aldermen was amended so as to show the whole amount of the expenses, and as it appeared that the amount of the assessment for benefits did not exceed the whole amount of the expense of laying out and of construction, nor half the amount of the benefit to all the estates, the petition for a writ of certiorari was dismissed.

The words "laying out," "locating anew," "altering," "widening," "grading" and "discontinuing," when used in statutes in reference to highways, have each a well-known meaning. Pub. Sts. c. 49.

"Laying out" is, and has been from the earliest times, the appropriate expression for locating and establishing a new highway. Without citing colonial or provincial statutes, reference may be made to the St. of 1786, c. 67. Section 4 of that statute provided that, after it has been ascertained to be of common convenience or necessity to have a new way laid out, the Court of General Sessions of the Peace shall appoint a committee to lay out said highway, "and they shall ascertain the place and course of said road, in the best way and manner they can; which having done, they, or the major part of them, shall make return thereof, under their

hands and seals, to the next Court of General Sessions of the Peace to be held in the same county, after the said service is performed; to the end the same may be accepted, allowed and recorded, and afterwards known for a public highway." "And said committee are empowered and required, under oath, to estimate the same," that is, the damages occasioned by the laying out, "and make return thereof as aforesaid. And if any person find himself aggrieved by the doings of the said committee, in locating said way, or in estimating damages, he may apply to the Court of General Sessions of the Peace, provided such application be made to the said court that shall be held in the same county, next after the acceptance of said return," &c. The committee were required to ascertain the "place and course of said road," but there is no provision requiring a specification of the grade or the manner in which the road shall be constructed.

The St. of 1827, c. 77, which established county commissioners, required, in § 7: "And when they shall order any highway or road to be laid out, or altered, the said county commissioners shall perform all the duties by law required of committees for laying out highways. And they shall also determine, and specify in their return of said laying out or alteration, the manner in which the highway or road so laid out, or altered, shall be made, and the time or times within which the same shall be completed." This provision, with others, was incorporated in the Rev. Sts. c. 24, § 10. See also Gen. Sts. c. 43, § 13; Pub. Sts. c. 49, § 9.

The provisions of statute giving an owner of land compensation for damage occasioned by reason "of any raising, lowering, or other act done for the purpose of repairing such way," was first enacted in the Rev. Sts. c. 25, § 6, in consequence, perhaps, of the decision in *Callender v. Marsh*, 1 Pick. 418. See *Brown v. Lowell*, 8 Met. 172.

The principle, in assessing damages, of deducting from the general damages any special benefit resulting to the land-owner from the laying out of the way, has been constantly recognized by the court. *Commonwealth v. Norfolk Sessions*, 5 Mass. 435. *Commonwealth v. Middlesex Sessions*, 9 Mass. 388.

As, under the early statutes, the order of laying out a highway did not necessarily, in reference to the manner of construction,

specify anything more than the "place and course of said road," under such an order the highway might be constructed in any manner which the authorities might determine to be necessary to make it safe and convenient for travellers, and then it might, after its original construction, be raised or lowered by the authorities, without making any new compensation to the land-owner. As the early statutes did not require the highway to be constructed within any fixed time, but did require the committee, which laid out the way, to estimate the damages, and, if any person was aggrieved by the doings of said committee in locating said way or in estimating damages, required that application be made by him to the Court of General Sessions of the Peace held in the county next after the acceptance of the return of the committee, which court, by a jury or by a new committee, might determine the damages "and also finally fix and determine the place of such road or highway," (St. 1786, c. 67, §§ 4, 5,) it must often have happened that the damages, including the special benefit to be deducted, were assessed before the land taken for a highway was actually entered upon for the purpose of constructing the highway. They must have been assessed with reference not only to a way to be constructed, but also to any probable or possible change within the original limits in the grade or construction of the highway, which the authorities at any time after the original construction might deem it necessary to make. Under existing laws, damages for the taking of land for a highway, including the special benefit to be deducted, may be determined before the land has been entered upon and possession taken for the purpose of constructing the way, although they are not payable until after such entry and possession. Pub. Sts. c. 49, § 14. It is unnecessary to say that, after a way has been laid out, no additional order or adjudication is necessary to construct it. Undeniably, if the words "locating and laying out of a park," in the St. of 1875, c. 185, § 7, are to receive the same construction as the words "laying out of a highway" receive in the statutes relating to highways, this park was duly located and laid out by the first order of the park commissioners, passed December 27, 1879.

It is contended, however, that the words "laying out," in the St. of 1875, c. 185, cannot have the same meaning as in the statutes

relating to highways, but must mean so to arrange, improve and construct a park that it may be fit and convenient for public use, and that the park is not laid out until it is so improved and constructed. The contention is not that authority to locate and lay out a park, even if § 3 of the statute did not expressly give the board of park commissioners authority to improve, govern and regulate it and the use thereof, would not necessarily imply authority to construct a park; but the contention is that until the park is constructed it is only located, and not laid out.

The St. of 1875, *c.* 185, established a board of park commissioners, and in § 3 it is provided that "said board shall have power to locate within the limits of the city of Boston one or more public parks; and for that purpose, from time to time, to take in fee, by purchase or otherwise, any and all such lands as said board may deem desirable therefor; or to take bonds for the conveyance thereof to said city; to lay out, improve, govern and regulate any such park or parks, and the use thereof; to make rules for the use and government thereof," "and generally to do all needful acts for the proper execution of the powers and duties granted to or imposed upon said city, or said board, by this act," &c.

It is to be noticed that this is a power to locate more than one park, and the construction of this act must be the same whether any particular park is located where this park has been, or in South Boston, or in what was Roxbury, or Dorchester, or Brighton, or in any other place within the limits of the city of Boston. The particular condition of the land taken for a park at the time it is taken, whether or not it is in a suitable condition for immediate public use as a park, can have no effect upon the construction to be given to the act. What then is the meaning of the location, as distinguished from the laying out of a park? The word "locating" has not acquired a technical signification in our statutes, except perhaps in the locating anew of a road. Pub. Sts. *c.* 49, § 13. Gen. Sts. *c.* 43, § 12. The word "location" is sometimes used, in the statutes relating to ways, to mean the land included within the limits of the way as laid out, and sometimes as synonymous with "laying out." The ordinary meaning of the words "to locate" is "to ascertain and determine the place of," and in this sense they

might well be used in connection with the technical words "to lay out." If the statute had authorized the board to determine the place of one or more public parks, and to lay them out, no difficulty would have arisen in the construction of these words. The laying out would have been the formal, definite designation of the boundaries of the land in the place determined upon, and the dedication and establishment of the land so bounded as a public park.

It is argued that, as in § 3 the words "to locate" are used in the first clause of the section, and the words "to lay out" in a subsequent clause in connection with "improve, govern and regulate any such park or parks," the words "to locate" must be construed in the sense in which the words "to lay out" are used in statutes relating to highways, and that "to lay out" must be construed to mean something analogous to the words "to improve," &c. But without considering how much weight ought to be given to the particular words of this section, disconnected from the other provisions of the statute, such an argument gives no distinct force to the words "to lay out."

It was undoubtedly the intention of the statute to give the board of commissioners full authority to locate and lay out a park or parks, and to construct, improve, govern and regulate such parks as should have been by them located and laid out, subject to the provision "that no land shall be taken, or other thing involving an expenditure of money done, until an appropriation, sufficient to cover the estimated expense thereof, shall have been made by a vote of two thirds of each branch of the city council of said city." If the intention of the statute had been that the commissioners should only locate and lay out parks, and that some other authority should construct, improve, govern and regulate the parks so laid out, the additional words "improve," &c. would of course have been omitted. The construction and regulation of public parks is not governed by general laws, and in § 3, the words "to improve, govern and regulate" were inserted for the purpose of making it certain that such powers were conferred upon a board specially constituted by that statute, and were not inserted for the purpose of modifying the meaning of the words "to lay out," as established in this Commonwealth.

Section 7 provides that all benefit and advantage to real estate for which an assessment may be laid shall be "any benefit and advantage from the locating and laying out of a park under the provisions of this act." Nothing here is said of any benefit and advantage to real estate from the improvement of the park, and this tends to show that no assessment is authorized for any other benefit than that which is received from what is involved in the locating and laying out of the park.

The St. of 1871, c. 382, § 1, authorizes an assessment for benefits, not only when a new way is laid out, but also when an old way is altered, widened, graded or discontinued. Under this statute the benefit received from the laying out of a new way is the benefit received from the laying out and construction of the new way, and undoubtedly the benefit received from the locating and laying out of a park, in § 7, is the benefit received from the locating, laying out and construction of a park; but there is no provision for any new assessment for benefits received from any alteration or improvement of the park made after the park has been once laid out and constructed. When a way is laid out, there is an obligation existing somewhere to construct it as laid out, and this statute undoubtedly imposes an obligation on the board of park commissioners to construct the park laid out in some manner to be determined by them, if sufficient appropriations of money are made by the city council. It is unnecessary to determine here whether, if the city council should refuse or neglect to make sufficient appropriations, or if, sufficient appropriations having been made, the board of park commissioners should refuse or neglect properly to construct the park, a writ of mandamus would issue, as in the case of a neglect or refusal to construct a way lawfully laid out. See *Richards v. County Commissioners*, 120 Mass. 401; *Whiting v. Mayor & Aldermen of Boston*, 106 Mass. 89.

It is impossible to hold, as matter of law, that a park cannot be located and laid out, even if there is no adequate provision of law whereby courts can compel it to be constructed in a manner which they may deem suitable for public use. If it becomes a nuisance, it can be abated; and there might be a public park, intended to be kept open for prospect, air and light, or

as a protection against the spread of fires, or for other purposes, and not intended to be entered upon and used by travellers. By § 5, the damages for the taking of land are to be determined "in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways in the city of Boston," and § 7 requires notice to be given "to all parties interested as is provided by law to be given by the street commissioners of the city of Boston in cases of laying out streets in said city," and we see no reason to hold that the Legislature used the words "laying out" in two different significations in the act. We think the words "laying out," as well as the words "to lay out," were used in the act according to their established meaning in statutes relating to ways, and that the park was legally located and laid out by the first order passed by the board of park commissioners, December 27, 1879.

It is argued that, in consequence of the provisions of § 8, as well as in the nature of things, the assessment for benefits cannot be laid until the park is substantially constructed, even if it has been laid out within the meaning of the statute. No time is prescribed by the statute within which the park must be constructed, and it cannot have been unintentional that the provision of the St. of 1871, *c.* 382, § 4, to the effect that no assessment for benefits shall be made until the work of laying out is completed, was omitted. The statute itself shows that it was drawn with the statutes then existing relating to betterments in mind. Its provisions in relation to betterments were largely taken from them. It might perhaps have been thought that none of the parks that would be located under the act could be constructed in two years. Whatever the reason may have been, the omission to require the park to be completed before an assessment could be made, cannot be treated as an accidental or unintentional omission. At the same time the limitation of two years was put in, which had been first inserted in the statutes relating to betterments in the St. of 1869, *c.* 367. The statute under consideration is in this respect different from the statute law as it ever before existed in this Commonwealth. Before the St. of 1869, *c.* 169, there was no provision in the statute that the assessment should be made after the work was completed, or within any limit of time; this statute provided that

the assessment should not be made until the work had been completed, and the St. of 1869, c. 367, provided that the assessment should be laid within two years after the order for the laying out; and, since the passage of the last-named statute, the laying of the assessment for betterments in the laying out of ways has been subject to both these limitations. This court has never yet been called upon to construe a statute which required the assessment to be laid within two years after the passage of an order, except in connection with the other provision that the assessment shall not be made until the work is completed; and all the decisions of the court upon assessments for benefits under the early statutes, which imposed no limitation of time and no condition that the work should be completed before the assessments were made, are to the effect that the assessments may be made after the work is substantially completed, and need not be made at the same time as, or as a part of the order for, the laying out of the way. One reason, which has in some of the opinions been given why the order for the assessments need not be a part of the order for laying out, is, that it is impossible that the assessment could then be laid, because the actual expenses of construction could not then be known, and the assessment for benefits must be a proportional share of the expenses. It is however conceivable that the city of Boston might purchase a lot of land already fitted for use as a street, and lay it out as a street, and the whole cost of making it a street might be known at the time of laying out. The reason has not been given, that it was impossible to make the assessments for betterments at the time of the laying out of the highway because the whole amount of the benefits could not then be estimated, and this in the case of highways would not perhaps be a sound reason, because, from a time long before the passage of the first of these betterment acts, the statutes have required that the manner in which the highway should be constructed, and the time within which it should be completed, shall be specified in the return of the commissioners, so that it would appear in the proceedings for laying out a highway in what manner and when it must be constructed, and the whole benefits to be received from such a construction could in the nature of things be estimated. But there is no means of determining from the papers in this case in what manner or

when the park must be constructed, and there is no statutory standard for the construction of a park.

The papers in this case disclose more than one order. There is an order of the city council of July 23, 1877, authorizing the treasurer to borrow \$450,000, "to be expended by the park commissioners in the purchase of not less than one hundred acres of land or flats" within an area that is there described by bounds; there is an order of the city council of December 24, 1877, by which the park commissioners are authorized "to complete the purchase of any part or parts of the said tract upon the terms provided in the said order, at such times as they shall deem expedient;" and there is an order of the city council, approved November 21, 1879, authorizing the park commissioners, so far as the consent of the city council may be necessary thereto, to exercise their power of taking land for the proposed park. And these are the three orders of the park commissioners which have been heretofore mentioned. It appears by the agreed facts, that at the date of the assessment of betterments the city of Boston had theretofore actually expended \$439,690.90 in the purchase of different parcels of land for the park in different sums paid from December 29, 1877, to July 11, 1879, and had theretofore expended \$111,763.16 for the filling, grading and surveying of the Back Bay Park. It is manifest that the park was in a general sense located, and some work done on its construction, before the passage of the formal order of December 27, 1879, laying out the park. By this order the land not already purchased within the boundaries described in the order was taken, so that by the terms of the act the fee vested in the city of Boston, (§ 6,) and the whole land so bounded was formally established and "created" as a public park. It is plain, as has been said, that the Legislature in this act did intentionally omit to require that the park should be fully completed before the assessment should be laid, and it is plain that it did not intend to leave the time for making the assessments indefinitely open; and it is also plain that it did not fully consider the difficulties which must arise in making an assessment, for benefits received from the locating and laying out of a park, before the park is constructed, when the manner in which it will or may be constructed, and the time within which it must be constructed, are neither prescribed

by statute nor required to be specified in any order of the city council or of the park commissioners.

But the difficulties of construing the act are not necessarily in the act itself, but in its application to the subject matter. If the act related to a highway, there would be no difficulty in its construction, under the fact found, that at the date of the assessment the expenses actually incurred exceeded the amount of the assessments. *Chase v. Aldermen of Springfield*, 119 Mass. 556. The two years after the passage of the order "the execution of which causes the benefit for which the assessment is made," would be reckoned from the passage of the order of laying out; and the most reasonable construction of this statute, we think, is that, as it is "the benefit and advantage from the locating and laying out of a park" which are to be considered in making an assessment, it is the order of laying out the park from the passage of which the two years, within which the assessment must be made, begin to run, and that the execution of this order causes the benefit for which the assessment is made. See St. 1871, c. 382, § 1; St. 1869, c. 367, § 1. Unless then we can say, as matter of law, that, under the facts of this case, there can be, from the locating and laying out of this park, in the manner in which they have been done, no benefit or advantage to the real estate to which the assessments apply, we cannot quash the order of assessment; and that we cannot say.

The question of benefit or no benefit, and of the amount of the benefit, if any, is a question of fact for the jury, if any person has been aggrieved by the assessment. It is useless here to consider the rules of law in accordance with which the amount of the benefit received must be determined by a jury of the Superior Court, in case any party aggrieved by this assessment shall make application to that court for a jury. If it be assumed, without consideration, that the benefits received must be confined to the benefits received from the park in the condition it was in at the time the assessments were made, and that no possible or probable future construction or improvement of the park can be considered, or if all the facts existing at the time the assessment was made that can actually affect the market value of land can be considered in estimating the benefits, in either case it is a question of fact for the jury whether any

benefit has been received. From the fact that the order of assessment was made the same day as the order of laying out, we can infer nothing in regard to the benefit received from the laying out. Land could be purchased or taken, and laid out as a park, from which benefit and advantage to real estate would be received immediately. The condition of this land, and its adaptability to confer benefit and advantage by being laid out as a park, do not appear upon the records of the proceedings of the board of park commissioners. They are facts in the country. Some of them have been agreed upon in this case, but, if they are competent, we cannot say, as matter of law, that it appears therefrom that no benefit has been received. This is a petition for a writ of certiorari to quash the proceedings of the board of park commissioners. A writ of certiorari lies only to correct errors in law, and no error in law appears in the record of the commissioners, and there are no provisions of the act that need be construed in any such manner as to render it unconstitutional. In the opinion of a majority of the court the

Petition must be dismissed.

THOMAS D. DEMOND & others vs. DANIEL S. BURNHAM.

Suffolk. January 26. — September 7, 1882.

A promissory note was dated at "Boston," and following the name of the maker were the words "Brighton District." In an action against an indorser on the note, the evidence tended to show that when the note was given, and until some weeks before it became due, the maker had a place of business in the Brighton District; that, on the day it became due, a notary public went with the note to that place and found it closed and unoccupied; that he made inquiries at a hotel opposite to it, but could find no other place of business of the maker; and there was no evidence that he made any further inquiries or any attempt to find either the maker or his place of business or residence. *Held*, that the words "Brighton District" did not designate the place at which the note was payable; and that there was not sufficient evidence of a demand upon the maker to charge the indorser.

CONTRACT against Daniel S. Burnham as indorser of a promissory note, for \$200, dated Boston, October 20, 1879, payable

three months after date, at —, to the order of the plaintiffs, and signed "Webster C. Langmaid, Brighton District." The name of the defendant appeared on the back of the note. The answer admitted the indorsement of a certain note by the defendant, which he stated he believed was signed by said Langmaid, and that, when the original note which he so indorsed should be produced at the trial, his signature would be admitted; and alleged want of demand on the maker and of notice to the defendant. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions, which, after stating that the pleadings formed part of the exceptions, was in substance as follows:

The plaintiffs are the owners and holders of said note, and the name of Burnham, the indorser, was on the note before it was delivered to the payee. The bookkeeper of the plaintiffs testified that the words "Brighton District" were written by the maker at the time the note was given, but the defendant was not present.

A notary public testified that, at the maturity of the note, on the last day of grace, he went to the Brighton District in Boston, and, upon inquiry for the place of business of the maker, Langmaid, was shown a store in a block nearly opposite the hotel, which store was at that time closed; that he looked through the window and saw that it had the appearance of a grocery from which the stock had been removed; that he made inquiries at the hotel, but could find no other place of business of Langmaid, and that he could get no other trace of Langmaid; that he had the note with him, but could find no one in or at the store upon whom to make demand; that he mailed to the indorser on that evening, prepaid, a notice of demand and non-payment. The notarial protest set forth that the notary "demanded payment at the last place of business of the promisor. No person there was authorized to pay."

One of the plaintiffs testified that he knew Langmaid's place of business; that it was the only grocery in a block nearly opposite the hotel, in the Brighton District, Boston; that he was so informed by Langmaid at or before the time the note was given, and had been at the store several times, the last time some weeks before the note fell due, the store being then open; that he had

no other means of information; but he testified, just before he left the stand, that he knew this was Langmaid's place of business at the time the note fell due.

No other evidence of demand was introduced, and the judge ruled that the plaintiffs could not maintain their action upon this evidence, and directed the jury to return a verdict for the defendant. The plaintiffs alleged exceptions; and the judge reported the case for the determination of this court.

If on the foregoing evidence there was a question for the jury, the plaintiffs were to have a new trial. If the ruling of the court was correct, judgment on the verdict was to be entered.

E. C. Gilman, for the plaintiffs.

A. Russ & W. G. A. Pattee, for the defendant.

W. ALLEN, J. The defendant in his answer does not deny, and therefore admits, that he indorsed the note declared on. It must be taken, therefore, that the words "Brighton District," were upon the note when it was indorsed. These words do not designate the place at which the note is payable. They are not inserted in the blank left in the body of the note for the place of payment. They follow the signature, and are connected only with that, and can have no greater effect than to identify the maker as of the Brighton District. The court will take notice that the Brighton District is a part of Boston; and the utmost effect that can be given to the words is to treat them as a part of the date of the note, as if they had been written before the word Boston. They cannot be construed as if the words "payable at the place of business of the maker in" had been written before them, and we are not called upon to decide what effect they would have if they had been so written.

The question is, whether there was sufficient evidence of a demand upon the maker to charge the indorser. The promise not being to pay the note at any particular place, demand must be made upon the maker personally, or at his place of business, or at his residence, or a sufficient excuse for not making a demand must be shown. No demand was made, and the excuse for not making one is that the maker could not be found. This is a sufficient excuse, if it appears that reasonable diligence was used to find the maker, his residence and place of business. The evidence

tends to show that when the note was given, and until "some weeks" before it became due, the maker had a place of business in the Brighton District; that, on the day the note became due, a notary public went with the note to that place and found it closed and unoccupied; that he made inquiries at a hotel opposite to it, but could find no other place of business of the maker. There is no evidence that he made any further inquiries, or any attempt to find either the maker or his place of business or residence. The general statement that he could get no other trace of the maker must be taken in connection with the effort which it appears he made to get some trace. The most that can be inferred from this is that the maker had no place of business when the note became due. Giving to the note and the evidence the effect most favorable to the plaintiffs of which they will admit, the case is presented of a note, not payable at a particular place, dated at Brighton District, Boston, the maker of which has no place of business. The note is then payable at his residence, and demand should be made there, or upon him personally. But no attempt was made to present the note where it was payable. It was treated by the notary as a note payable at a particular place, and a demand was attempted to be made only at that place. After the notary had ascertained that that was not the place of business of the maker, and therefore not the place of payment of the note, no diligence whatever was used to find the place of payment. There was no evidence that the maker did not have a place of residence in the Brighton District, nor that it was not known to the plaintiffs, the payees of the note, nor that the notary could not have found it, had he made any inquiry or looked into the city directory. The only ground upon which it can be held that a demand was not necessary in this case is, that a demand need not be proved until the defendant had proved that the residence of the makers was known to the plaintiffs, or could have been found by reasonable diligence. Generally, when such questions are tried, the place of residence of the maker will be in evidence, and that evidence may be decisive, on the one side or the other, of the question of diligence; but where no evidence is offered in regard to that, and all that appears, besides the note itself, is that a notary was employed to make a demand, who made no attempt to find the place of

residence of the maker, but contented himself with an ineffectual demand at the maker's former place of business, — where it does not appear that his residence was not at the place of the date of the note, and was not known to the plaintiffs, or could not have been found on reasonable inquiry, — it cannot be said that that diligence was exercised which will excuse a demand. The presumption that the maker resided where the note was dated is not controlled or weakened by the fact that he had a former place of business there which he had recently ceased to occupy, or that an indorser, when sued, did not fortify the presumption by evidence. *Talbot v. National Bank of the Commonwealth*, 129 Mass. 67. *Granite Bank v. Ayers*, 16 Pick. 392. *Smith v. Philbrick*, 10 Gray, 252. In the opinion of a majority of the court, there must be

Judgment on the verdict.

WILLIAM NEWSOME vs. JOSEPH C. DAVIS.

Suffolk. March 13. — Sept 7, 1882. ENDICOTT & DEVENS, JJ., absent.

Two certificates of stock in two corporations, for one thousand shares each, were pledged as collateral security for a debt, the pledgee having the right to sell them, by public or private sale, if the debt was not paid when due. When the debt was payable, and for some time after, the shares of one of the corporations were worthless, and the shares in the second corporation had no known or uniform price, and sometimes they could not be sold at any price. The pledgee sold all the shares at private sale for \$850. In an action by the pledgor against the pledgee for negligence in the sale, the plaintiff was allowed to put in evidence of a sale of one hundred shares of the second corporation at \$1.37½ per share, the day following the sale by the defendant, and a sale of fifty shares of the same stock, three days later, at \$1.12½ per share. *Held*, that the defendant had no ground of exception to the admission of this evidence.

The plaintiff delivered to the defendant two certificates of a number of shares of stock in each of two corporations as collateral security for the payment of a debt, "with authority to sell the same without notice, either at public or private sale, or at brokers' board, at the option of the holder or holders hereof, on the non-performance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining after paying all sums due from me to the said holder or holders." *Held*, in an action for loss occasioned by the defendant's negligence in the sale of the stock, that, under the authority given him, the defendant had the right, on the non-performance of the plaintiff's promise, to sell either certificate of stock, or both if the proceeds of the sale of one

did not satisfy the debt, and was not bound to divide either certificate into small lots, or to sell the stock immediately on default, or to postpone the right to sell if the stock was then depreciated in value; and that an instruction to the jury that the defendant "must use the same care, prudence and diligence in the sale of it that a prudent man would in the sale of his own property," was erroneous.

TORT. The declaration contained two counts: the first for the conversion of certain shares of stock in two mining companies, and the second for negligence in the sale of the same. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff was a dealer and speculator in stocks, and the defendant a money-lender. On March 22, 1880, the plaintiff borrowed of the defendant the sum of \$750, for thirty days, and signed and delivered the following promissory note: "\$772.50. Boston, March 22, 1880. Thirty days after date, for value received, I promise to pay Joseph C. Davis, or order, seven hundred and seventy-two dollars and fifty cents, and interest at the rate of three per centum per month, for such further time as said principal sum or any part shall remain unpaid, I having deposited with this obligation, as collateral security, one thousand shares Aztec Copper Co. and one thousand shares Atlas Mining Co., with authority to sell the same without notice, either at public or private sale, or at brokers' board, at the option of the holder or holders hereof, on the non-performance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining after paying all sums due from me to the said holder or holders. In case of depreciation in the market value of the security hereby pledged, or that may hereafter be pledged for this loan, I hereby agree to deposit a further amount of security on demand, so that the market value shall always be at least twenty per cent more than the amount of the note. And, failing to deposit such additional security, this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding; and the holder or holders may immediately reimburse themselves by sale of the security. And it is further agreed that the holder or holders hereof may purchase at said sale."

The plaintiff delivered to the defendant the two certificates of stock named in the note, with powers of attorney, in the

usual form, authorizing the transfer of the shares to the defendant on the books of the company; and this was immediately done. The defendant, at the time of the delivery of the note, gave to the plaintiff a receipt for the shares of stock, agreeing to give them to him on payment of the note. The interest for thirty days was added to the amount lent, thus making the note \$772.50.

The note was not paid when it became due; and the defendant offered evidence tending to show that, many times during the months of May, June and July, 1880, he demanded payment of the note and debt of the plaintiff; that he requested him to take up the stock, and notified him that, unless he did so, he should sell the shares of stock the first opportunity he had to do so; that the plaintiff often promised to pay the note, but did not pay it or any part of it, or the interest; that the defendant made efforts to sell said stocks or shares by public and also by private sales during these three months, but could not get a bid or any offer for them until July 30, 1880, on which day he sold said stock to Charles E. Fuller, a stock-broker, for \$850, enough to pay the amount of the note and interest to that time, and on that day he delivered the certificates of stock to Fuller, with powers of attorney signed in blank, which Fuller afterwards filled up for their transfer on the books of the company, and the defendant applied said \$850 to the payment of the note and debt. It appeared in evidence, and was not controverted, that said stocks had no known or fixed or uniform price; that they were speculative stocks, for which there was sometimes a demand or sales, and sometimes there was no call or demand for them, and it was sometimes impossible to sell them at any price.

The judge ruled, and it was not controverted, that the defendant had the right, under the agreement in the note, to sell these stocks at private sale without demand; but the plaintiff contended, and offered evidence tending to show, that the defendant did not, in said sale to Fuller, exercise due care and diligence, and make proper efforts in such sale to get all he could for them; and that they were sold all at one time for less than they ought to have been, and the plaintiff in consequence sustained a loss; and that, if the defendant could have realized more than

he did, by selling the stocks or shares in small lots from time to time, he should have sold them in that way.

It did not appear that there was any market for or any sales of the Atlas Mining Company stock during the summer of 1880, or that it was of any value. The plaintiff offered evidence of a sale of Aztec Copper Company stock on July 31, 1880, of one hundred shares at \$1.37½ per share, and also of a sale on August 3, 1880, of fifty shares at \$1.12½ per share, both said sales being in Boston. The defendant objected to this evidence, but the judge admitted it, on the ground that any sales made about the time of the defendant's sale to Fuller were competent; and the defendant excepted. The defendant also offered evidence, which was not controverted, that at no time did the plaintiff give to the defendant any direction or suggestion how or what was the best way or method of selling these stocks. There was no evidence of any sale of said stocks at any time of over one hundred shares in any one day, or in any one lot, except said sale to Fuller.

The defendant asked the judge to instruct the jury as follows: "1. By the terms of the note the defendant was not obliged to sell at public sale or at the brokers' board. 2. The defendant was not obliged to give the plaintiff notice of the sale. 3. It was the plaintiff's duty to pay the note and take up the stock when it became due, and if he refused and neglected to do so, but suffered the stock to remain and be sold, after being requested to take it up, and after being told that it would be sold if he did not take it up, it was his own fault if it was sold. 4. If the plaintiff knew of any way in which the defendant could have sold it for a higher price, it was his duty to have told the defendant or his agent of that fact, and it was the defendant's right to sell all the stock, and he was not obliged to wait until he could sell it in small lots. 5. If the plaintiff could have sold the stock for any more than he pledged it to the defendant for, it was his duty to have taken up his stock and paid the defendant's note. 6. This action as to the first count cannot be maintained, as the defendant had an interest in the stock, and the right under the note against the plaintiff to sell the stock at private sale. 7. Upon the contract contained in the note and receipt, this action cannot be maintained on the

second count. 8. Upon the whole evidence, this action cannot be maintained."

The judge gave the first and second requests for instructions; refused the third and fourth, saying that they were matters of fact for the consideration of the jury, and refused to give either the sixth, seventh or eighth requests; and ruled that the defendant was bound to use due diligence and care in the sale of said stock to protect the rights of the plaintiff; that he must use the same care, prudence and diligence in the sale of it that a prudent man would in the sale of his own property; and that if the defendant did this he was not liable, but, if he did not, he was liable to the plaintiff for the loss, if any, which the plaintiff had sustained by such sale.

The jury returned a general verdict for the plaintiff, for \$668; and the defendant alleged exceptions.

J. B. Richardson, for the defendant.

J. E. Cotter, for the plaintiff.

FIELD, J. It does not appear from the exceptions that the sales of the Aztec Copper Company stock were not rightly admitted in evidence. The sales may have been at public auction, and they were near in point of time; and no such facts appear as enable us to say that the court erred in admitting them. *Benham v. Dunbar*, 103 Mass. 365. *Kent v. Whitney*, 9 Allen, 62. *Cahen v. Platt*, 69 N. Y. 348.

Whether the third request for instructions should have been given depends upon what it means. If it means that, the plaintiff being in default, the defendant had a right to sell the stock, it should of course have been given. If it means that, the plaintiff being in default, the defendant had the right to sell the stock in any manner and for any price he saw fit, without taking any pains to obtain for it what it was worth, it should not have been given.

Apparently the real contest between the parties was whether the defendant was bound to sell the stock in small lots if thereby he could get more for it, and whether the instruction of the court, that "the defendant was bound to use due diligence and care in the sale of said stock to protect the rights of the plaintiff, that he must use the same care, prudence and diligence in the sale of it that a prudent man would in the sale of his

own property," was a correct and adequate statement of the law.

Under the authority given to the defendant, he had the right, on the non-performance of the promise of the plaintiff, to sell either certificate of stock, or both if the proceeds of the sale of one did not satisfy the debt, and was not bound to divide either certificate up into small lots, even if a prudent owner, having regard solely to his own interests, would have done so.

The defendant was not bound to sell the shares immediately on default, but he had a right to sell them then if he chose, and he was under no obligation to the plaintiff to postpone the exercise of this right, if the stocks were then depreciated in value. The defendant was bound to exercise reasonable care and diligence to obtain whatever the stocks were worth at the time he sold them. It is possible that, if a prudent person ever became the owner of such stocks, he might think it best to hold them, under the expectation that they would rise in value, but the defendant was not required to do this.

Under the instructions given by the court, as applied to the evidence and to the contentions of the parties, the jury may have been misled into the belief that the duty of the defendant was to exercise the same prudence and diligence which a prudent owner would exercise in determining the time when he would sell his own stocks, and whether he would sell each certificate of stock as a whole or in parcels; and for this reason the exceptions must be sustained.

It is unnecessary to consider whether there was any evidence that would support the count in the nature of trover.

Exceptions sustained.

JOHN McDERMOTT *vs.* CITY OF BOSTON.

Suffolk. March 15. — Sept. 7, 1882. ENDICOTT & DEVENS, JJ., absent.

A laborer, engaged in the service of a city under the direction of a foreman, cannot recover against the city for personal injuries resulting from the negligence of the foreman, who is his fellow-servant, in the absence of evidence that the foreman was incompetent, or that the city was negligent in employing him or in providing suitable apparatus for the work in which they were employed.

TORT for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Answer, a general denial. At the trial in this court, the plaintiff offered evidence tending to prove the following facts :

The defendant was engaged in the work of lowering and putting in position certain large iron pipes upon the margin of Chestnut Hill reservoir. Fourteen men were employed in said work, including the plaintiff. The general management and direction of the work were entrusted to a superintendent, Jones, who was rarely personally present. Under him, one Dever and one McGranary had the personal management and direction of the work and workmen, and the furnishing of the apparatus and machinery for the same, — Dever when there, and McGranary in Dever's absence. At the time the plaintiff was injured, Dever was absent, and McGranary was present and in charge of the work ; and at that time the only tackle or appliances brought to the place of work by the superintendent, or by any other person, for the purposes of the work, consisted of a rope and block with a single sheave. In a tool-chest, some five minutes' walk from this place, were additional blocks, including a double block ; and at this time there were other gangs of men in the employ of the city, engaged in similar work in the vicinity ; the tool-chest contained all the tackle and appliances, which were at the disposal of the different superintendents of the different gangs of men for their different specific jobs. The double block had been used the day before by the gang in which the plaintiff worked, in connection with the single block and the same rope ; and the same rope was continued in use by them after the plaintiff was injured, and no other accident occurred before or after that.

The pipes, each of which was twelve feet long and forty-eight inches in diameter, and weighed about eight thousand pounds, were lowered down an incline, the total fall of which was about six feet, and upon an angle of about thirty-five degrees. The method of lowering the pipe, at the time the plaintiff was injured, was as follows: one end of the rope was made fast to a fixed stand, thence carried to the pipe to be lowered and wound around it twice (making a single coil), carried back to the stand (to which the single block was attached) through the block, then some little distance to a post, around which it was wound in the same manner as around the pipe, and then passed into the hands of two or three of the men, who were to hold back upon the rope, steadying and controlling the pipe as it went down the run or incline. Nine or ten other men, whose duty was the same, had hold of the rope between the post and the block. This holding-back force of men consisted of ten or eleven, which constituted the whole force available for the rope. The post was part of a fence, about a quarter of an inch of the surface of which was rotten, and the rest of it sound; and it was painted.

McGranary directed the men to use the post as aforesaid, and no examination of the same was made by him before it was so used. One of the men, McLaughlin, suggested to McGranary to have the post used, "so that the rope would come easier on the hands of the men." When everything was made ready as above described, the pipe was pried on to the edge of the incline and started down the same. The weight thus brought upon the rope in the hands of the men and around the post was so great, that instantly the post was broken and the rope pulled out of the hands of the men. Nothing broke but the post. The plaintiff's foot was caught in the rope, and he was pulled against the block, and his foot torn off. The plaintiff was in the exercise of due care.

The plaintiff called three witnesses, who were all qualified and testified as experts, and each of whom testified that a single rope and single block were an insufficient, unsafe and unsuitable apparatus to use for this work.

The plaintiff contended that the tackle was insufficient, improper and unsafe for the performance of said work; that the city was negligent in not furnishing for the work sufficient,

proper and safe tackle and machinery, and that the plaintiff was injured in consequence of such negligence; that McGranary was an incompetent and inefficient person for the superintendence of the work; and that the defendant was guilty of negligence in entrusting the work to him, and did not exercise due care in selecting him.

The judge ruled that the evidence would not warrant the jury in finding any negligence on the part of the city for which it would be responsible in this action; and that the negligence, if any, which the evidence tended to prove, was negligence of fellow-servants of the plaintiff. The jury returned a verdict for the defendant; and the case was reserved for the consideration of the full court, according to whose opinion on the correctness of this ruling, judgment was to be entered upon the verdict, or a new trial ordered.

W. Gaston & H. E. Swasey, for the plaintiff.

T. M. Babson, for the defendant.

W. ALLEN, J. There was no evidence that McGranary was an incompetent person, nor that the defendant was negligent in employing him; neither was there evidence that the defendant was negligent in regard to providing suitable tackle. The only negligence which the evidence tended to prove was, either in selecting and using for the particular purpose tackle insufficient therefor, instead of the sufficient tackle which the defendant had provided, or in using it in an improper manner. In either case, it would be the negligence of a fellow-servant of the plaintiff, which would give him no cause of action against the defendant.

Judgment on the verdict.

JAMES J. COSTELLO, executor, *vs.* HORACE S. CROWELL,
administrator.

Suffolk. March 17. — Sept. 7, 1882. ENDICOTT & DEVENS, JJ., absent.

At the trial of an action upon a promissory note made by the defendant's intestate, the issue was whether the signature of the intestate was genuine or forged. The payee of the note testified that the intestate was financially embarrassed, and applied by letter to the witness for a loan of the money for which the note was given; which letter was in evidence. The defendant offered the evidence of the cashiers of two banks, that the intestate could have borrowed money at each bank; which evidence was excluded. *Held*, that the defendant showed no ground of exception.

On the issue whether the signature of the maker to a promissory note was genuine or forged, in an action on the note, the plaintiff put in evidence two letters, with proof, not by experts, that they were in the handwriting of the maker. The defendant called experts, who testified that, in their opinion, the letters were not in the maker's handwriting. The plaintiff was then allowed to call an expert to testify that, in his opinion, the letters were in the maker's handwriting. *Held*, that the admission of this testimony was within the discretion of the judge.

Where the genuineness of a signature of a person is in issue, a paper containing another signature of such person may be admitted in evidence, as a standard of comparison, if its genuineness is found as a fact by the presiding judge upon clear and undoubted testimony, before it is submitted to the jury; and that finding cannot be revised or set aside by this court, unless it is founded upon error in law or improper or insufficient evidence.

At the trial of an action by the executor of the payee of a promissory note against the alleged maker, the defence to which was that the signature of the maker was a forgery, a master in chancery was allowed to testify, against the plaintiff's objection, to declarations made by the plaintiff's testator as to his property and means when offering himself as bail for his son in a criminal case. This son had indorsed to his father another note purporting to be signed by the same person as the note in suit. The evidence was admitted for the sole purpose of showing the circumstances under which the declarations were made, and the authority of the magistrate. *Held*, that the plaintiff did not show any ground of exception.

In an action by a payee against the alleged maker of a promissory note, the defence to which was that the signature of the maker was a forgery, the defendant, for the purpose of showing that the payee did not have the means of advancing the money which he alleged was the consideration of the note, was allowed to show that the plaintiff did not use means which he did possess. *Held*, that if there was evidence that the plaintiff had no other means, the evidence admitted was competent; and that if there was no such evidence, the evidence was immaterial, and the plaintiff could not be prejudiced by it.

If incompetent evidence, admitted under objection, is withdrawn by the judge with instructions to the jury to disregard it, the objecting party has no ground of exception.

If a witness, on looking at an entry in a book made by him at the time, is able from it to testify to the delivery of articles, his testimony is admissible, although he has no present memory of the transaction; and if he cannot, from recollection, fix the date, that being a material fact, the entry itself is admissible for that purpose.

CONTRACT upon two promissory notes. The first note was payable to the order of James Costello, the plaintiff's testator, and purported to be signed by Thomas Corey, the defendant's intestate. The second note was payable to the order of John F. Costello, a nephew of Corey, who indorsed it to James Costello, and purported to be signed by Corey. The defence was that both notes were forgeries. At the trial in the Superior Court, before *Gardner, J.*, the jury returned a verdict for the defendant on the first note, and a verdict for the plaintiff on the second note; and each party alleged exceptions, which appear in the opinion.

H. E. Swasey & G. R. Swasey, for the plaintiff.

J. G. Abbott, for the defendant.

W. ALLEN, J. 1. It does not appear that the court erred in excluding the testimony, offered by the defendant, of the cashier of one bank that Corey could have borrowed money at that bank, or the testimony of the cashier of another bank that its president had instructed him to let Corey have, on his account, whatever money he desired. The question on trial was, whether the signature of Corey to the note was genuine or forged. This evidence was offered to contradict the testimony of Costello, the payee of the note, that Corey was financially embarrassed, and had applied, by letter, to the witness for a loan of the money for which the note was given; which letter was in evidence. The fact that Corey might have borrowed money of two other persons would not, of itself, be competent to prove that he did not borrow of his nephew, nor that he was not financially embarrassed; but it was a circumstance which might have been so connected with other circumstances as to have become competent. It is upon the party objecting to its rejection to show that it was material. *Fisher v. Plimpton*, 97 Mass. 441.

2. The plaintiff put in evidence two letters, with proof, not by experts, that they were in the handwriting of Corey. The defendant called experts, who testified that, in their opinion, the letters were not in Corey's handwriting. The plaintiff was

allowed to call an expert to testify that, in his opinion, the letters were in the handwriting of Corey. This was a matter within the discretion of the court.

3. The first exception taken by the plaintiff is to the admission of a check, with evidence that it was signed by Corey, as a standard of comparison. Before a specimen of handwriting can be admitted for this purpose, it should be shown by clear and undoubted testimony that it is genuine. Its genuineness must be found as a fact by the judge at the trial, before it can be submitted to the jury. This court can revise that finding, and can set it aside only if founded upon errors in law, or improper or insufficient evidence. There is no exception to any principle of law upon which the finding was made, and the evidence was sufficient to sustain it.

4. The testimony of the masters in chancery objected to was admitted for the sole purpose of showing the circumstances under which certain declarations of James Costello were made, and the authority of the magistrates. We think that the testimony that John F. Costello, the son of James, and the indorser to him of one of the notes under consideration, was the principal for whom James offered himself as bail, was competent for the former purpose; and it does not appear what the testimony as to the nature of the offence charged was, nor that the plaintiff was prejudiced by it.

5. It was competent for the defendant to prove that James Costello did not have the means to advance the money for which the plaintiff contended that the notes in suit were given. As one step in this proof, it was competent to show that he did not use for that purpose means that he was known to possess, to give effect to evidence that he did not possess other means. It does not appear that there was not such evidence, and without it the evidence objected to would be wholly immaterial, and the plaintiff could not have been prejudiced by it. *Higgins v. Andrews*, 121 Mass. 293. *Atwood v. Scott*, 99 Mass. 177. *Stebbins v. Miller*, 12 Allen, 591. *Whitcher v. McLaughlin*, 115 Mass. 167.

6. The testimony of the witness Ahl, which was objected to by the plaintiff, was withdrawn by the court from the consideration of the jury, and they were instructed to disregard it. If it was incompetent, this removed all ground of exception. The

same is true of the order-book of Groom & Co. *Smith v. Whitman*, 6 Allen, 562. There is no reason to suppose that the plaintiff was prejudiced by the introduction and withdrawal of the evidence.

7. The remaining exception of the plaintiff is to the admission of the entry in the books of Korff & Co. to prove the date of the delivery of the blanks by them to Groom & Co., on one of which the note in suit was written. These entries were first used to refresh the memory of the witness Armstrong. They were clearly competent for that purpose. It was an original entry, made by the witness, which enabled him upon looking at it to testify to the fact, not from actual recollection, but because he knew that he could not have made the entry unless the fact had been true. 1 Greenl. Ev. § 437. *Dugan v. Mahoney*, 11 Allen, 572. *Morrison v. Chapin*, 97 Mass. 72. This use of the entry did not make it evidence, nor authorize it to be submitted to the jury, unless for the purpose of testing the memory which had been refreshed by it. Subsequently the defendant offered the book itself in evidence, and it was admitted, and the entry read to the jury. We think it was properly admitted. Armstrong testified to the delivery of the blanks, but he could not, from recollection, fix the date, which was a material fact. For the purpose of doing this, the entry made by the witness at the time of the transaction, in the regular course of business, was competent. 1 Greenl. Ev. § 116. *Kennedy v. Doyle*, 10 Allen, 161, and cases cited. *Bunker v. Shed*, 8 Met. 150. *Welsh v. Barrett*, 15 Mass. 380. *Shove v. Wiley*, 18 Pick. 558. *Anderson v. Edwards*, 123 Mass. 273, and cases cited. *Union Bank v. Knapp*, 3 Pick. 96. *Adams v. Coulliard*, 102 Mass. 167.

Exceptions overruled.

JOSEPH W. HASKINS *vs.* JULIAN D'ESTE & another.

Suffolk. March 20. — Sept. 7, 1882. ENDICOTT, J., absent.

In an action against D. and M. the writ described them as "late copartners under the firm name and style of D. & Co.," and the declaration alleged that they made a promissory note signed "D. & Co." D. alone appeared, and filed a general denial. *Held*, that the signature to the note was alleged to be that of D.; and that, under the St. of 1877, c. 163, the genuineness of the signature was admitted, and it was not necessary for the plaintiff to prove that D. was a member of the firm of D. and Company.

W. ALLEN, J. The St. of 1877, c. 163, provides that "any signature to a written instrument declared on or set forth as a cause of action or ground of defence or set-off, in an action at law, shall be taken as admitted, unless the party sought to be charged thereby shall file in court, within the time allowed for answer, a special denial of the genuineness of such signature and a demand that the party relying thereon shall prove the same at the trial."

The two defendants were sued in a writ which describes them as "late copartners under the firm name and style of D'Este & Co.," and the declaration alleges that they made a promissory note signed "D'Este & Co." One of the defendants, McKenzie, did not appear; the other, D'Este, appeared and filed a general denial. The question is, whether the signature is to be taken as admitted to bind D'Este, or whether it is only admitted as the signature of a copartnership of D'Este & Co., and the plaintiff, to hold D'Este, must prove that he was a member of the firm whose signature he admits. The question is precisely what it would have been if both defendants had appeared and filed a general denial in answer. The admission is the same, as to those making it, whether made by both defendants together, or separately, or by one alone.

A partnership is not a person distinct from its members, like a corporation. A partnership cannot be sued; a suit must be against the individuals composing it, and each individual stands, as to proof of his liability, as if he were sued alone. In either case, his personal liability upon the joint undertaking would have to be made out, and, in either case, the allegation of partnership

would but express the relation between the copartners; and the relation of copartners to each other, as affects their liability to third persons, is simply one of agency. The allegation that a number of individuals as members of a copartnership made a contract, is only the allegation that each of them, personally, or by his agent, made it, and the agency is alleged and proved by the copartnership.

In the case at bar, the substantial allegation is that each of the defendants made a joint note in the name of D'Este & Co., that is, that each of them signed that name to the note. The allegation of copartnership amounts only to a statement that each of the defendants was authorized to sign that name for both, and that an agent might be authorized to sign it for both. This is the whole significance of the firm name. It is a name which the partners adopted, by which each could, in certain matters, bind the other with himself, or another agent might bind both. It was simply a convenient abbreviation of their two names, and when used had the same effect as if no firm name had been adopted and the name of each partner had been signed in full as a partner; and it bound each only because he had adopted it as his name, and authorized its use for the purposes for which it was used. When the defendant D'Este admits the genuineness of the signature, he does not admit it to be a mere name, — he admits it to be a sign-manual, the name of a person signed, and the only question is, Whose name does he admit it to be? The answer is plain; he admits it to be the genuine signature of the persons whose signature it is alleged in the declaration to be. The declaration does not allege that the firm made the note; it alleges that the defendants, D'Este and McKenzie, in the name of D'Este & Co., made, that is signed, the note; that it is the genuine signature of both in the name they had adopted for binding themselves jointly. It is said that it is not alleged that the note was signed by the defendant D'Este personally, and that he may not have been one of the persons doing business under the name of D'Este & Co. But it is alleged that the two defendants, one of whom is D'Este, made the note in that name. If the allegation had been that the defendant D'Este, doing business in the name of John Doe, had made the note in that name, it would hardly be contended that the

genuineness of his signature would not be admitted, because there might have been another person doing business in that name whose signature it might be; nor because the signature might have been made by an agent, and not by the defendant personally. The declaration alleges that the defendants made the note. If the writ is taken in connection with the declaration, there is, so far as the question in issue is concerned, only the further allegation, in effect, that the two defendants held such a relation to each other that each had authorized the other to bind him in a joint note, by the name of D'Este & Co. We think the signature is alleged to be that of the defendant D'Este; and that its genuineness, not having been denied, must be taken to have been admitted. See *Wilkes v. Hopkins*, 1 C. B. 737; *Mahaiwe Bank v. Douglass*, 31 Conn. 170.

In the opinion of a majority of the court, the ruling of the judge, that the plaintiff was not entitled to recover was, for these reasons, erroneous.

Exceptions sustained.

B. E. Perry & S. W. Creech, Jr., for the plaintiff.

P. H. Hutchinson, for the defendant.

GOODWIN INVALID BEDSTEAD COMPANY vs. H. R. DARLING.

Suffolk. March 21. — Sept. 7, 1882. ENDICOTT & C. ALLEN, JJ., absent.

The St. of 1881, c. 113, providing that, when it appears from the pleadings in any suit that either party sues or is sued as a corporation, such fact shall be taken as admitted, unless the party controverting it shall file in court, within ten days from the time allowed for answer, a special demand for proof of the fact, does not apply to an action in which the plaintiff sues as a corporation, and in which an answer denying each and every allegation in the writ and declaration has been filed, and more than ten days have elapsed, after the time allowed for answer, before the passage of the statute; but it is incumbent on the plaintiff to prove the existence and organization of the alleged corporation.

W. ALLEN, J. The plaintiff sues as a corporation. The defendant's answer "denies each and every allegation in the plaintiff's writ and declaration contained." Before the St. of 1881, c. 113, was enacted, such pleadings put in issue the fact of the corporate existence of the plaintiff. *Hungerford National Bank*

v. *Van Nostrand*, 106 Mass. 559. *Mosler v. Potter*, 121 Mass. 89. *Hebron Church Deacons v. Smith*, 121 Mass. 90, note. *Williamsburg Ins. Co. v. Frothingham*, 122 Mass. 391.

The St. of 1881, c. 113, which provides that, when it appears from the pleadings in any suit that the plaintiff or defendant sues or is sued as executor, administrator, guardian, trustee, assignee, or a corporation, such fact shall be taken as admitted, unless the party controverting it shall file in court, within ten days from the time allowed for answer, a special demand for proof of the fact, was not enacted until after the answer in this case was filed and the case was at issue, and more than ten days after the time allowed for answer had elapsed, and does not apply to the case. The ruling of the judge, that it was incumbent on the plaintiff to prove the existence and organization of the alleged corporation, was correct. *Exceptions overruled.*

J. W. Pickering, for the plaintiff.

C. R. Brainard, for the defendant.

JAMES E. DODD & another, trustees, vs. J. P. C. WINSHIP,
guardian.

Suffolk. March 27. — Sept. 7, 1882. ENDICOTT & FIELD, JJ., absent.

Property was devised to trustees in trust to invest and hold it and pay over the net income to the testator's widow during her life, and on her decease to pay over the principal to the children of the testator, the issue of any deceased child to take by right of representation. While the widow was living, the trustees allowed a son of the testator to appropriate to his own use a portion of the income. This son died before the widow. *Held*, that, in settling their account in the Probate Court with the remaindermen, the trustees could not credit themselves with the sum thus appropriated by the son, as part of the estate coming to his children.

W. ALLEN, J. The appellants, trustees under the will of John Hooper, were to hold and invest the estate and pay over the net income to Mrs. Hooper during her life, and at her decease to pay over the principal to the children of the testator, "the issue of any deceased child to stand in their parent's stead and receive their parent's share." Mrs. Hooper died in 1873, and the trust

for her benefit then terminated, and the estate was thereafter held in trust to pay over the remainders. In settling the account of that trust, the trustees ask to be allowed, as part payment of the remainder which belongs to the children of Dwight S. Hooper, a son of the testator, the amount of a sum received by him, before his death in 1871, and interest thereon. The money received by him was income of the estate, which he was allowed by the trustees to keep and appropriate to his own use.

This cannot be treated as a payment to him of a part of his estate in remainder, because the money did not belong to that estate, but to Mrs. Hooper. The sum for which they ask allowance is in their hands as part of the estate in remainder, and the effect of allowing it would be to appropriate to their own use a portion of the share of the remainder given to Dwight S. Hooper. They cannot claim a right in the remainder as assignees of Dwight S., for, apart from the question of their authority to take such an assignment, the facts do not show any assignment, express or implied. Neither do we think that the transaction created a debt which can be set off against the share. The trustees were then acting as trustees for Mrs. Hooper, as well as for the remaindermen. As trustees for her, it was their duty to pay the income to her. They allowed Dwight S. to take and appropriate to his own use the income which belonged to her.

It is argued that this transaction created a debt to the trustees, either in their capacity as trustees for Mrs. Hooper, or personally, which would give them a right of retainer or set-off against Dwight S., and that his interest in the remainder was vested, so that his share passed to his heirs or personal representatives, and the account is to be settled as if he were living. But if he took the entire and absolute interest in his share, and if the transaction created a debt from him to the trustees, both fiduciary and personal, such debt would constitute no proper item in this account. If there is a debt due to the trustees, it is as trustees for Mrs. Hooper, and not for the remaindermen. The trust for her was a distinct trust, and was long since determined, and the fact that the trustees now accounting were also trustees for her does not make them parties to the account in

such capacity. So a debt from Dwight S. to the trustees personally is foreign to their account as trustees. They cannot, by becoming his creditors, acquire a right to retain a part or the whole of his share in the remainder when accounting for that as trustees. Such debts show no payment from the estate, and give the trustees no right of retainer or of set-off, in rendering their account. The account is intended to show the condition of the estate. It is the account of the trustees with the estate, and does not involve their personal account with a remainderman, or the state of their accounts with other trusts; and no provision is made for the trial of any disputed claims, or jurisdiction given for determining any equitable rights they may assert against him. Whatever rights of that nature a trustee may have are not involved in the settlement of his account in the Probate Court.

Decree of the Probate Court affirmed.

E. D. Sohier & C. A. Welch, for the appellants.

C. T. Russell & W. E. Russell, for the appellee.

ATTORNEY GENERAL *vs.* JAMAICA POND AQUEDUCT CORPORATION.

Suffolk. Nov. 18, 19, 1880; Nov. 15, 16, 1881. — Sept. 8, 1882. W. ALLEN
& C. ALLEN, JJ., absent.

An information in equity, in the name of the attorney general, will lie against a quasi public corporation doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are not only to impair the rights of the public in the use of one of the great ponds of the Commonwealth for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud and offensive vegetation detrimental to the public health.

Under the St. of 1868, c. 182, authorizing the corporation therein named, for the purpose of better supplying fresh water and of saving and restraining the water that might percolate from a certain great pond into another pond named, in land owned by the corporation, to take, hold or purchase any land near or adjoining said land, and to enlarge the last-named pond and to raise a dam on said land, and providing that the water of said pond should never be drawn down lower than a certain depth, except for the purpose of repairing the dam or clearing out the pond, the corporation has no right to sink wells on the land so taken, for the purpose of intercepting the underground currents as a source of water supply; and such acts are *ultra vires* and illegal.

MORTON, C. J. This information in equity alleges that Jamaica Pond is one of the great ponds of the Commonwealth; that the defendant, by its charter and other statutes, was authorized to draw water from the pond for the purposes of its incorporation, provided it did not reduce the level of the pond below a certain limit referred to in the statutes; that by the St. of 1868, c. 182, the corporation was further authorized, for the purpose of better supplying fresh water and of saving and restraining the water that might percolate from Jamaica Pond into what was formerly known as Spring Pond, to take, hold or purchase certain land near Spring Pond, and to enlarge Spring Pond and to raise a dam on said land; that said corporation, under the St. of 1868, took a certain tract of land of the Brookline Land Company; that it is now digging upon the land so taken a large well as a source of water supply, and is erecting a building, and proposes to establish extensive machinery in connection with said well, for the purpose of taking water from said well and distributing it through the pipes of the corporation; that the corporation has no legal right to use the land taken for these purposes, or to dig wells or draw from wells as a source of water supply; and that the necessary effect of sinking the well and drawing water from it will be to lower the water in Jamaica Pond below the limit fixed as aforesaid, to impair the rights of the public in the use of the pond for fishing, boating and other lawful purposes, and to create and expose upon the shores of said pond a large quantity of slime, mud and offensive vegetation very detrimental to the public health.

The defendant has demurred to the information; and the first ground taken is, that it does not state a case which is within the equity jurisdiction of the court. Assuming, for the purposes of this question, that the defendant has no right or authority to sink wells for the purpose of obtaining a supply of water, the information presents a case where a quasi public corporation is doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are not only to impair the rights of the public in the use of one of the great ponds for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud and offensive vegetation detrimental to the public health.

The cases are numerous in which it has been held that the attorney general may maintain an information in equity to restrain a corporation, exercising the right of eminent domain under a power delegated to it by the Legislature, from any abuse or perversion of the powers, which may create a public nuisance or injuriously affect or endanger the public interests. *Agar v. Regent's Canal Co.* Coop. temp. Eldon, 77. *Attorney General v. Great Northern Railway*, 1 Dr. & Sm. 154. *Attorney General v. Mid-Kent Railway*, L. R. 3 Ch. 100. *Attorney General v. Leeds Corporation*, L. R. 5 Ch. 583. *Attorney General v. Great Eastern Railway*, 11 Ch. D. 449. *Attorney General v. Great Northern Railway*, 4 DeG. & Sm. 75. *Attorney General v. Cohoes Co.* 6 Paige, 133.

The information in this case alleges not only that the defendant is doing acts which are *ultra vires* and an abuse of the power granted it by the Legislature, but also that the necessary effect of such acts will be to create a public nuisance. This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. And when the nuisance is a public one, an information by the attorney general is the appropriate remedy. *District Attorney v. Lynn & Boston Railroad*, 16 Gray, 242. *Attorney General v. Cambridge*, 16 Gray, 247. *Attorney General v. Tudor Ice Co.* 104 Mass. 239. 2 Story Eq. Jur. §§ 921-923.

This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance, by partially draining the pond and exposing its shores, thus endangering the public health.

The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment, or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy. *Cadigan v. Brown*, 120 Mass. 493.

There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction, of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public, are regarded as valuable rights, entitled to the protection of the government. *West Roxbury v. Stoddard*, 7 Allen, 158. *Attorney General v. Woods*, 108 Mass. 436. *Commonwealth v. Vincent*, 108 Mass. 441. If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief.

Suppose a city or an aqueduct corporation commences a canal or an aqueduct, without authority from the Legislature, designed to draw off great quantities of the water, and to reduce the size and level of a pond, so as to injure or endanger the rights of the public therein, an information in equity would furnish the only adequate means of asserting and protecting the rights of the government and of the public. The Legislature has the right to determine to what extent the defendant corporation may draw down the waters of Jamaica Pond for the purposes for which it was incorporated.

The information in this case alleges that the necessary effect of the acts of the defendant will be to lower the water below the point limited by the Legislature, and to impair greatly the rights of the public in the pond for the purposes of boating, fishing and other lawful uses. We are of opinion that, upon this ground, it states a case within the equity jurisdiction of this court, as well as upon the ground that the acts of the defendant will produce a nuisance deleterious to the public health.

We are thus brought to the question whether the acts of the defendant, of which the information complains, are *ultra vires* and illegal. This depends upon the construction of the St. of 1868, c. 182. The first section of this statute provides that "The Jamaica Pond Aqueduct Corporation is hereby authorized and empowered, for the purpose of better supplying fresh water,

and for saving and restraining the water that may percolate from Jamaica Pond, into what was formerly known as Spring Pond, in land now owned by said corporation, to take, hold or purchase any land near, or adjoining said land, now owned by said corporation, on the northerly side of Perkins Street, and easterly side of Chesnut Street, and may enlarge said pond, formerly called Spring Pond, and raise a dam on said land taken or purchased, to such height as may best serve to save and restrain the water now running to waste from said Spring Pond, the better to save and supply fresh water from said Spring Pond for aqueduct purposes; but the said corporation are not authorized by this act to take land within fifty feet of any part of the stream that flows from the western side of Pond Avenue or Chesnut Street; provided, that the water of said pond shall never be drawn lower than one foot in the shallowest part, except for the purpose of repairs of the dam, or clearing out the pond."

The defendant contends that, when it took under this statute the land in question, it took the entire fee of the land, and thereby acquired the right which any owner has to sink wells in his land and intercept the underground streams or currents. But this claim cannot be sustained. The uniform rule in Massachusetts is, that when the Legislature delegates to a corporation or person the power to take land of another in the exercise of the right of eminent domain, such corporation or person takes only such estate in the land taken as is necessary to carry out the purposes for which it or he is permitted to take it. This rule is constantly applied in the cases of highways, turnpikes, railroads, canals, aqueducts, sewers, and other like cases. *Harback v. Boston*, 10 Cush. 295. *Clark v. Worcester*, 125 Mass. 226. It is not necessary that the defendant should have a fee to enable it to carry out all the purposes of the act, and it therefore took only an easement, and the fee remained in the original owner. *Ætna Mills v. Brookline*, 127 Mass. 69-72.

The defendant contends that the sinking of wells and constructing hydraulic pumps and other machinery are within the purpose of the Legislature and within the scope of the St. of 1868. In this country, as in England, a grant from the sovereign power is to be construed strictly against the grantee. Nothing will be included in the grant except what is granted

expressly or by clear implication. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666. *Newton v. Commissioners*, 100 U. S. 548. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 416. The St. of 1868 declares the purposes for which the defendant may take such land to be for saving and restraining the water that may percolate from Jamaica Pond into Spring Pond, and by raising a dam on the land taken, to such height as to save and restrain the water now running to waste from Spring Pond, the better to save and supply fresh water from Spring Pond for aqueduct purposes. The object of the statute was to save the water percolating from Jamaica Pond, and by preventing waste from Spring Pond to increase the efficiency of that pond as a source of supply.

There is nothing in the statute which points to the sinking of wells to be used as a source of supply by intercepting the underground currents which help to supply Jamaica Pond, and to establishing hydraulic pumping machinery. The purposes for which the defendant is using the land taken are different from and foreign to the purposes for which it was authorized to take it. Its use of it for such purposes is a perversion of the powers granted it by the Legislature. We are of opinion that the defendant has no authority to use the land taken for the purpose of digging wells and appropriating underground currents. *Bailey v. Woburn*, 126 Mass. 416.

The provisions of the second section, giving a remedy to any person whose land or water or water-rights shall be taken or injured, cannot, as contended by the defendant, enlarge the powers granted by the first section; they being merely intended to give a remedy to those who may be injured by the exercise of the power or franchise given in the first section, and not to confer new or additional powers.

Upon the whole case, therefore, we are of opinion that the information states a case within the equity jurisdiction of the court.

Demurrer overruled.

The case was argued in November 1880, by *M. Williams, Jr.*, for the defendant, and by *R. M. Morse, Jr.* & *H. L. Harding*, for the plaintiff; and reargued in November 1881, by the same counsel.

FREDERICK W. CLAPP vs. CITY OF BOSTON.

Middlesex. Jan. 12. — Sept. 7, 1882. LORD, FIELD & C. ALLEN, JJ.,
absent.

A licensee, under a parol license from the owner of land, of a well and an hydraulic ram thereon, cannot maintain a petition for damages against a city for an interference with the use of the well and ram, by the taking of the land by the city under the right of eminent domain.

PETITION to the Superior Court for the assessment of damages by the taking by the respondent, under the St. of 1872, c. 177, of land of the petitioner, and of a certain right to take water from the land of another person. Trial before *Gardner, J.*, who allowed a bill of exceptions, in substance as follows :

On October 26, 1852, John W. Olmstead conveyed to Albert Ballord, the right to maintain a dam, then built across a small brook running into Stony Brook, and also a well already sunk below the dam, and an hydraulic ram, by the means of which and of pipes water was forced and conveyed to the land of Ballord. Ballord afterwards conveyed his land and the easement annexed thereto to the petitioner.

Before July 28, 1876, the county commissioners of Middlesex County, at the request of the respondent, laid out a highway across land adjoining the petitioner's, and through the place where the well and ram were situated, but below the dam. The petitioner, after the laying out of the highway, by the oral consent of one Lewis, removed the ram from the limits of the highway, and placed it upon the land of Lewis in a well sunk to receive it, at a point forty feet distant from where it formerly stood. Lewis derived his title to this land from said Olmstead.

On July 28, 1876, the respondent took, under the St. of 1872, c. 177, a portion of the land of the petitioner, and also lawfully flowed the land of Lewis where the ram and well were, so that the ram would not work, and the petitioner was thereby deprived of the use of the water at his house and barn, which stood upon land not taken by the respondent.

The judge, at the request of the respondent, ruled that the petitioner was not entitled to recover any damages for the destruction or interference with the right or easement in the water.

The jury were also instructed to assess the petitioner's damages, for the taking of his land and for the taking of the water right, separately. A verdict was returned accordingly. The respondent paid the damages found for the land; and, by agreement of parties, if the petitioner was entitled to recover for the loss of his water right, judgment was to be entered for him in a certain sum; otherwise, the exceptions to be overruled.

W. Gaston & G. C. Travis, for the petitioner.

A. J. Bailey, for the respondent.

W. ALLEN, J. The only question presented by these exceptions is, whether the petitioner can recover damages for the interference by the respondent with the use of the well and hydraulic ram situated on the land of Lewis. The right granted by Olmstead to Ballord was to maintain the then existing well and ram, and, if this easement was not extinguished by the location of the highway through the land and the consequent abandonment of the easement by the petitioner, it could not be changed by him to a different place on the same parcel of land.

The case finds that the well and ram were placed by the petitioner, where they were situated when interfered with by the respondent, by virtue of a parol license from Lewis, who had acquired the title of the land from Olmstead. This gave the petitioner no estate or right in the land. It was a permission by the owner, which excused acts done under it which without it would be unlawful; and which was revocable, not only at the will of the owner, but by his death, or by alienation or demise of the land by him, and by whatever should deprive him of the right to do the acts and to give permission to do them. When the respondent took the land of Lewis, it took from him the right to do the acts upon the land which he had licensed the petitioner to do, and the right to license the doing of them; and the license given by him was thereby determined. The license by Lewis passed no estate or right in the land out of him which could be reserved to the licensee when the respondent took the land, or on account of which Lewis's damages for such taking could be reduced. When the respondent took the land, the right to maintain upon it the hydraulic ram was in Lewis, and not in the petitioner; and, in using the land for the purpose

for which it was taken, no right of the petitioner was interfered with, and no damage was done to his property. *Cook v. Stearns*, 11 Mass. 533. *Cheever v. Pearson*, 16 Pick. 266. *Drake v. Wells*, 11 Allen, 141. *Exceptions overruled.*

OTIS H. SMITH & another vs. GEORGE B. MILTON & others.

Middlesex. March 10, 1881; March 10. — Sept. 22, 1882. ENDICOTT & DEVENS, JJ., absent.

A declaration, containing several counts, alleged that W. had a contract with a building committee to build a schoolhouse, and applied to the plaintiff to furnish lumber and materials to be used for the schoolhouse in performance of the contract; that the plaintiff refused to furnish and sell the lumber or materials on the credit of W.; that the defendants, who constituted the building committee, in consideration "that the plaintiff would so furnish and sell to W. the said lumber and materials," promised to accept and honor such orders as W. should draw, and to pay them out of the moneys which should become due to W. under the contract; that the plaintiff sold and delivered said lumber and materials to W.; that certain orders were made and presented, containing a specification that they were to be paid respectively "out of the third and fourth payments;" that these orders were such as the defendants had promised and agreed to accept; that afterwards the third and fourth payments mentioned in the orders were due and payable to W.; and that the defendants refused to pay the orders. *Held*, on demurrer, that it was not necessary to allege that the lumber and materials were used in the schoolhouse; that the declaration did not show that the orders presented were such as the defendants promised to accept; and that the averment that the third and fourth payments were due and payable was sufficient to show a breach of the promise to pay the orders, without alleging that the payments were ordered by the architect, as required by the contract of building.

An order drawn upon a committee composed of several persons may be accepted by such persons individually.

An acknowledgment by the drawee of the receipt of an order does not constitute an acceptance of and promise to pay the order.

An objection to a declaration, not specified in a demurrer thereto, is not open at the hearing in this court on appeal.

CONTRACT. The declaration contained seven counts, to which the defendants demurred. The Superior Court sustained the demurrer, and ordered judgment for the defendants; and the plaintiffs appealed to this court. The allegations of the declaration and grounds of demurrer, so far as material to the points decided, appear in the opinion.

The case was argued at the bar in March 1881, by *C. T. Russell & W. A. Whiting*, for the plaintiffs, and by *T. P. Proctor & H. S. Milton*, for the defendants; and reargued in March 1882, by *C. T. Russell & W. E. Russell*, for the plaintiffs, and by *Proctor (Milton with him)* for the defendants.

C. ALLEN, J. It is not necessary to consider in detail all the causes of demurrer specified.

1. The consideration which is alleged in the first four counts is, "that the plaintiffs would so furnish and sell to said Webber said lumber and materials," with the allegation that the plaintiffs did sell and deliver to said Webber the said lumber and materials. There is an introductory averment that Webber had a contract with a building committee to build a schoolhouse, and applied to the plaintiffs to furnish lumber and materials to be used for said schoolhouse in performance of said contract, and the plaintiffs refused to furnish and sell said lumber and materials on the credit of Webber; but the consideration is alleged to be that the plaintiffs would furnish and sell the lumber and materials to Webber, not that they should be used in the schoolhouse. The objection that there is no allegation that they were so used, is therefore untenable.

2. According to the averments of the first and third counts, there was no promise to pay, except out of the moneys which should become due to Webber under the contract; and there is no averment that any money became due. These counts, therefore, rest on the averments of the promise to accept and honor such orders as Webber should draw. This means, so to accept them as to furnish evidence to the plaintiffs that the defendants would pay the amounts, if the same should become due to Webber. The acceptance would be conditional; but, such as it was, under the averments the plaintiffs were entitled to it. The question remains, if there is any sufficient averment of a refusal to perform this promise. The forms of orders which are averred to have been presented contain a specification that they are to be paid respectively "out of the third and fourth payments." The declaration does not show that the defendants agreed to accept such orders as these. The contract between Webber and the defendants does not show, and there is no averment, that the third and fourth payments were contemplated to be made,

or that such payments were still to be made when the orders were presented, or that they were equal to the amounts of the orders. So far as can be seen, by accepting these orders the defendants might have assumed a new and additional liability. The succeeding averment, that these orders were such as the defendants had promised and agreed to accept, means only that the orders were such as would be covered by the promise which had already been set forth in the declaration, and states therefore an inaccurate conclusion of law. For these reasons, the demurrers to the first and third counts were properly sustained.

3. The second count sufficiently alleges a breach of a promise to pay the orders. The promise alleged is to pay them "out of the moneys which should become due to said Webber under said contract of building." It sets forth the making and presentment of the orders, as in the first count, and then alleges that afterwards the third and fourth payments mentioned in the orders were due and payable to Webber, and that the defendants refused to pay the orders. It is objected that it is not alleged that the third and fourth payments were ordered by the architect, as required by the contract of building. We think that the averment that the third and fourth payments were due and payable is sufficient in declaring upon a breach of the promise to pay the orders, without alleging that the payments were ordered by the architect.

4. The only objection made to the fifth and sixth counts is, that the building committee as an official body is the drawee, and the order cannot be accepted by individuals. But it does not appear that the committee differs from any association of individuals; and an order drawn upon it is drawn upon a number of individuals associated together, but not incorporated nor copartners. In such case, although a bill may be treated as dishonored if not accepted by all the drawees, if accepted by a part it will be a good acceptance as to them. *Byles on Bills* (7th Am. ed.) 188. *Bayley on Bills* (6th ed.) 58, 181. *Owen v. Van Uster*, 10 C. B. 318. *Tombeckbee Bank v. Dumell*, 5 Mason, 56.

5. The seventh count is upon a writing which is alleged to be an acceptance of the orders and a promise to pay them. But the writing is only an acknowledgment of the receipt of the

orders, and contains no acceptance of them, or promise to pay them. This count is insufficient.

6. Other causes of demurrer are specified; but none of them are sufficient to sustain the demurrer. The defendants cannot avail themselves, at this hearing, of objections to the declaration not specified in the demurrer. *Washington v. Eames*, 6 Allen, 417. *Worthington v. Houghton*, 109 Mass. 481.

Demurrer to the 2d, 4th, 5th, and 6th counts overruled.

Demurrer to the 1st, 3d, and 7th counts sustained.



GILMAN TYNG vs. CITY OF BOSTON.

Norfolk. Jan. 12.—Sept. 7, 1882. LORD, FIELD & C. ALLEN, JJ., absent.

Under a statute, authorizing a city to annex a penalty not exceeding fifty dollars for a breach of its by-laws, its board of fire commissioners (whose only authority is to make regulations subject to penalties provided for the breach of the city by-laws) has no power, after finding a person in the employ of the fire department guilty, on charges of violations of its rules and regulations, to sentence him to "forfeit the amount of one month's pay," which is one hundred dollars, a rule of the department providing that violations of its rules and regulations may be punished by fine; and he may maintain an action against the city for the amount so declared to be forfeited, and such action is not a violation by him of an agreement that he would be subject to the penalties in the regulations of the fire department.

CONTRACT to recover \$100, the amount of one month's pay for services rendered by the plaintiff as engineer of a steam fire engine belonging to the fire department of the defendant city. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

E. W. Burdett, for the plaintiff.

E. B. Hagar, for the defendant.

W. ALLEN, J. The only defence relied upon is, that the pay sued for was forfeited by the action of the board of fire commissioners; and the answer made to that defence is, that the commissioners had no authority to declare the pay forfeited. The rule of the fire department provided that violations of the rules

and regulations of the department might be punished by reprimand, fine, suspension or dismissal. This was the only authority under which the board of fire commissioners, having found the plaintiff guilty, on charges of violations of the rules and regulations, sentenced him to "forfeit the amount of one month's pay, and be dishonorably discharged from the fire department." The amount of one month's pay was one hundred dollars.

The authority of the fire department is to make regulations subject to penalties provided for the breach of the city by-laws. St. 1850, c. 262. By the St. of 1821, c. 110, § 15, power was given to the city to make by-laws, and to annex penalties not exceeding twenty dollars for the breach thereof. By the St. of 1854, c. 448, § 35, it was provided that the penalty should not exceed fifty dollars. The authority by the statute was to annex a penalty not exceeding fifty dollars; the penalty annexed by the rule was a fine; the penalty imposed under the rule was the forfeiture of a debt of one hundred dollars due from the city of Boston to the plaintiff. If the forfeiture of pay could be construed to be a fine, it must be limited to the amount which could be imposed as a fine; and if the rule which authorizes the commissioner to punish by fine (not limiting the amount of the fine) is valid, it is because it impliedly limits the fine to an amount which it is within the authority of the fire department to prescribe. The commissioners had no authority to declare the pay forfeited; and the plaintiff, in demanding it, is not violating his agreement that he would be subject to the penalties named in the regulations of the fire department.

Judgment affirmed.

CHARLES W. MANSFIELD vs. BENJAMIN F. DYER.

Norfolk. March 17. — Sept. 7, 1882. ENDICOTT & DEVENS, JJ., absent.

If a person conveys, in fraud of his creditors, land subject to a mortgage, and the grantee, although he does not assume the mortgage debt, pays the mortgage, which is discharged on the record, and then conveys the land to a third person, and afterwards a judgment creditor of the first grantor levies upon the land by a sale of it as an equity of redemption, the payment and discharge will not be treated as an assignment of the mortgage, such not being the intention of the parties to the transaction, but, under the St. of 1874, c. 188, the levy is void, and the purchaser at the sale cannot maintain a writ of entry to recover possession of the land.

An officer's return on an execution recited that, on November 8, 1877, he seized and took all the right in equity or otherwise which the judgment debtor had, on the day when the same was attached on mesne process, of redeeming a certain parcel of real estate; that such seizure was made by posting up a notice stating the time and place appointed by him for the sale, at his office in a certain town, on December 22, 1877, at four o'clock in the afternoon, said notice being dated November 8, 1877, in the post-office in an adjoining town to that in which the land was situated, and on the 20th of said November, being thirty days before the time appointed for said sale, he gave a notice in writing in hand to said judgment debtor of the time and place appointed for the sale, and on the same day posted like notices in a certain store in the town of B. where the land was situated, and at the post-office in another adjoining town, and caused a like notice to be published in a newspaper in the county, once a week for three successive weeks; that on December 22, 1877, at his office, being the time and place appointed for the sale, he offered the land for sale by public auction, and, as there was no bid for the same, adjourned the sale for one week, at the same place and hour, at which time and place he sold the right in equity (or otherwise) said judgment debtor had, "at the aforesaid time," in and to the land described. *Held*, that the true construction of the return was that the officer sold an equity of redemption, and that the notices required by law were given.

If land subject to a mortgage is levied on as having been conveyed by the judgment debtor in fraud of creditors, by a sale of it as an equity of redemption, it is no objection to the validity of the levy that the mortgage covered another parcel of land conveyed by the debtor to a different grantee.

WRIT OF ENTRY, in two counts, to recover two parcels of land in Braintree. Plea, *nul disseisin*. After the former decision, reported 131 Mass. 200, the case was tried in the Superior Court, before Colburn, J., who allowed a bill of exceptions, which, so far as material to the points decided, was in substance as follows:

The demandant claimed title to the two parcels of land by virtue of a special attachment, made on September 13, 1875, on a writ in which he was the plaintiff and Warren Mansfield

the defendant, a levy, on an execution issued in that action, made November 8, 1877, and sheriff's deeds given December 29, 1877.

Warren Mansfield, the judgment debtor, on August 26, 1872, conveyed the parcels in controversy, with other lands, to Edward Potter. At the time the deed was given, the first parcel was subject to a mortgage for \$3500, which was paid by Potter, and discharged of record on October 15, 1872. The second parcel, known as the Pond lot, was, at the time of the conveyance to Potter, subject to a mortgage for \$1392, given by Mansfield on this lot and on another lot which he had, prior to the conveyance to Potter, sold to one Safford. Both of these lots were sold subject to this mortgage, which was still outstanding in 1880.

Potter conveyed to various persons portions of the first lot of land, and on June 26, 1874, conveyed the residue of it to the tenant, being the first parcel now in controversy, and also conveyed to him the whole of the second lot.

The officer's return, as amended, on the execution, so far as relates to the seizure and the notices, set forth that on November 8, 1877, he "seized and took all the right in equity or otherwise, which the within named Warren Mansfield had on September 13, 1875, the time when the same was attached on mesne process, of redeeming the following described real estate." Then followed a description of the land. "Said seizure being made by posting up a notice stating the time and place appointed and designated by me for selling said real estate, viz.: At my office in Weymouth, in the county of Norfolk, on Saturday, the twenty-second day of December next, at four o'clock in the afternoon, said notice being dated November 8, 1877, and containing a description of said real estate, in the post-office, a public place in the town of Weymouth, one of the towns in said county of Norfolk adjoining the town of Braintree aforesaid. And on the twentieth day of said November, being thirty days before the time appointed for said sale, I gave notice in writing in hand to said Warren Mansfield, of the time and place appointed for said sale, said notice containing a description of said lands, and on the same day I posted like notices at the store of Bates and Bowditch, a public place in said Braintree, the town

in which said land lies, and at the post-office, a public place in the town of Quincy, another town in said county adjoining said town of Braintree, and caused a like notice to be published once a week for three weeks successively before the time appointed for said sale in the Quincy Patriot, a public newspaper published at said Quincy, in said county of Norfolk."

The return also recited that the officer, on December 22, 1877, at four o'clock in the afternoon, at his office in Weymouth, being the time and place appointed for said sale, offered the first lot for sale by public auction, and as no one made a bid for the same, he, deeming it expedient and for the best interest of all concerned, adjourned said sale by giving public proclamation of the same, for one week, namely, to the 29th of said December, at the same time of day and place, at which time and place he sold the right in equity (or otherwise) said Warren Mansfield had "at the aforesaid time" in and to the lots described, &c.

The demandant offered to prove that the deed from Warren Mansfield to Potter was given in fraud of Mansfield's creditors, and that the tenant, when he took his conveyance from Potter, had notice of the fraud.

The judge ruled that the attachment, levy and sale gave the demandant no title on which he could maintain this action; and directed a verdict for the tenant, which was rendered. At the request of the demandant, the judge reported the case for the determination of this court.

E. Avery, (G. M. Hobbs with him,) for the demandant.

R. D. Smith & J. M. Baker, for the tenant, contended, among other things, as to the second parcel, that it could not be determined from the return of the officer whether he did what he should have done, or only recited this in his notice, or whether the land was to be sold at his own office or at the post-office, or whether the words "at the aforesaid time" referred to the time of the attachment, the time of the levy, the time of the notice, the time of the sale, or the time to which the sale was adjourned.

W. ALLEN, J. The levy upon the first parcel of land demanded in the writ was by a sale of the equity of redemption. If the land was not subject to the mortgage, the sale was void. The only authority for levying by a sale, if there was no

mortgage upon the estate, was by the St. of 1874, c. 188, and that does not authorize an estate free from mortgage to be levied upon and sold as an equity of redemption. *Hackett v. Buck*, 128 Mass. 369. The validity of the levy upon that parcel depends then, in the first place, upon whether there was a mortgage upon it at the time of the levy. That parcel was conveyed by Mansfield, the judgment debtor, to Potter, and by Potter to the tenant; the demandant offered to prove that both conveyances were in fraud of Mansfield's creditors. At the time of the conveyance to Potter, there was a mortgage upon the land, but it does not appear that it was put upon it by Mansfield, or that he was under any personal obligation to pay the debt, and it does not appear that Potter assumed the debt. The mortgage was paid by Potter, and was discharged on the record before his conveyance to the tenant. The attachment and the levy of the execution by a creditor of Mansfield were both after the conveyance to the tenant, who took the same right that Potter had, and no greater.

Before the payment and discharge of the mortgage, the interest in Potter's hands, liable to attachment by creditors of Mansfield, was an equity of redemption; and the demandant contends that, as the payment was not made by Mansfield, or by any person under obligation to him to make it, it cannot enure to his benefit or that of his creditors, and that, to prevent that consequence, the transaction will be treated as an assignment, and not as a discharge, of the mortgage. It may be that, if there had been an assignment of the mortgage in form, or if the parties had intended that it should have been assigned and kept alive, these considerations would have prevented a merger of the two estates in Potter, and the mortgage would have been kept alive. *Tucker v. Crowley*, 127 Mass. 400, and cases cited. But there was no assignment in form, and the parties did not intend that the mortgage should be kept alive, but intended that it should be discharged.

In *Crosby v. Taylor*, 15 Gray, 64, the fraudulent grantee of a mortgagor put in evidence a quitclaim deed to him from the mortgagee of all his right, title and interest in the premises, which contained also these words after the descriptive part: "which said mortgage is hereby cancelled and discharged, the

said Adams [the mortgagor] having recently conveyed his interest in said premises to said Taylor." It was held that this was an assignment of the mortgage, and that there was no merger. Chief Justice Shaw said: "We are of opinion that this instrument was, under the circumstances, a good assignment. The words 'cancelled and discharged' are controlled by the statement that the grantee had recently acquired the equity of redemption. If the conveyance of the equity had been good, the mortgage assigned and the equity of redemption would have merged; but if the creditors interfere and take the equity, then there is no merger, and the equity and the mortgage are still distinct." It will be observed that no evidence was offered as to when or by whom the debt was paid.

In *Eaton v. Simonds*, 14 Pick. 98, it was agreed, between the purchaser of an equity of redemption sold on execution and the mortgagee, that the latter should assign the mortgage to the former. The purchaser paid the amount of the debt and asked for an assignment. The mortgagee said an assignment would be unnecessary, and discharged the mortgage upon the record. Afterwards the mortgagor died, and it was held that his widow, who had released her dower in the mortgage deed, was entitled to dower in the land. Mr. Justice Wilde said, "The general principle is, that when the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking the assignment may be, and according to the real intent of the parties." "In the present case, however, the doctrine of merger is not applicable, for the estate in the mortgage of William Eaton was never assigned to the defendant, and never vested in him; so that it could not unite with the equitable title in him, so as to operate as a merger. But this mortgage has been legally discharged, the debt has been paid, and can no longer be set up as a subsisting title, either at law or in equity."

In *Wadsworth v. Williams*, 100 Mass. 126, a mortgagor conveyed to the judgment debtor by a quitclaim deed with covenants against all persons claiming under her. The grantee mortgaged the land and afterwards reconveyed to the mortgagor by a warranty deed, excepting from the warranty the two mortgages.



Afterwards the assignee of the mortgages, having received payment of the mortgage debts, gave to the mortgagor a quitclaim deed of the land, with a special covenant of warranty against all persons claiming under him, and against the first mortgage. It was held that this deed took effect as a discharge, and not as an assignment, of the mortgages, for the reason that the mortgagor, by force of her covenant in her deed to the judgment debtor, was bound to extinguish the mortgages, and was under the same obligation to his judgment creditors. The reconveyance from him to the mortgagor was said to be a nullity as to the judgment creditor, and he was entitled to the benefit of the covenants contained in the deed to the debtor.

In *Perry v. Hayward*, 12 Cush. 344, a mortgagor, by a deed fraudulent as to creditors, quitclaimed the mortgaged premises to the plaintiff, covenanting against all persons claiming under himself. The mortgagee subsequently, on payment of the mortgage debt by the plaintiff, released to him by deed of quitclaim all interest in the premises. Afterwards the premises were seized and sold, as an equity of redemption, on an execution against the mortgagor. It was held that the levy was void, because the estate was not mortgaged, and the land should have been set off; that, by the payment and release, the estate of the mortgagor was made absolute either in the mortgagor or the plaintiff. Chief Justice Shaw (apparently assuming that the attachment was prior to the discharge of the mortgage, which is immaterial) said, "It appears that whatever interest Nathan Perry [the mortgagor] had in the estate, or whatever his creditors had at the time of the attachment, in consequence of any conveyance of his, fraudulent as against them, the mortgage had been paid and discharged, and the estate had become absolute either in Nathan or William Perry [the plaintiff] before the execution was levied, so that whatever right the execution creditor had, to make that estate available to the payment of Nathan Perry's debt to him, was a right to levy on it specifically, not to sell the supposed equity of redemption." It will be observed that this case differs from *Wadsworth v. Williams*, last cited, and resembles the case at bar in that the fraudulent grantee was under no covenant or obligation to pay the debt.

In the case at bar, the mortgage was paid by a person having an interest to pay it, and the mortgage was discharged. This was all that was intended by the parties. The mortgagee did not intend to assign the mortgage. The instrument which he executed was not an instrument of assignment; it was not a deed. It was an acknowledgment of satisfaction of the mortgage, which, by the provision of the statute, had the same effect as a deed of release. Gen. Sts. c. 89, § 30. A release of the mortgage must operate to enlarge the estate of the mortgagor by adding the legal estate to the equitable interest. As the conveyance from Mansfield to Potter was void as to the demandant in this action, as to him the estate of the mortgagor remained in Mansfield, and he was the owner of the equity of redemption when, by the effect of the satisfaction of the mortgage and the acknowledgment of it upon the record, the mortgage deed became void, and the equitable changed into a legal estate. This is not a proceeding in equity to reform the instrument or to compel a new one. There was no mortgage upon the land at the time of the levy of the demandant's execution, and the levy, being by a sale of an equity of redemption, was void.

As to the second parcel of land demanded, the Pond lot, we think that the objections to the levy cannot be sustained. We construe the officer's return to mean, though the meaning is not clear, that it was sold as an equity of redemption, and that the notices required by law were given.

The principal objection to the levy is, that the mortgage covered other land than that levied on and sold. Mansfield mortgaged a parcel of land. He conveyed part of it, subject to the mortgage, to Safford, and the remaining part, also subject to the mortgage, to Potter, who conveyed to the tenant. The levy was upon the part sold to Potter. The purchaser takes whatever right Mansfield had to redeem it. The demandant and Mansfield, whom he represents, cannot complain, if the right to redeem a part of the mortgaged premises, by paying the whole mortgage, was sold, because Mansfield's act in dividing the property rendered it necessary. To hold otherwise would enable a mortgagor, by selling to a *bona fide* purchaser a portion of mortgaged premises, to put the rest beyond the reach of his creditors. Mansfield, by his own act, held the right to redeem the

land levied upon, by paying the whole debt, and that was the only right which could be sold on the execution. *Webster v. Foster*, 15 Gray, 31. Whether Mansfield or the purchaser at the execution sale could have any right of contribution, upon paying the debt, against the owner of the equity in the other parcel of the Pond lot, it is not necessary to consider.

It is immaterial whether the attachment was void or not. The condition of the property was not changed between the time of the attachment and levy. The result is, that the verdict for the tenant upon the first count is to stand, and the verdict upon the second count is to be set aside, and

A new trial had.

COMMONWEALTH vs. SUSAN E. HOPKINS.

Hampshire. Sept. 19. — 28, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

A complaint for keeping a disorderly house may be maintained by proof that only one person in the neighborhood or community was disturbed or annoyed, if the acts done were of such a nature as tended to annoy all good citizens.

A married woman may be convicted of keeping a disorderly house, if she acts of her own free will and without any coercion by her husband.

DEVENS, J. This is a complaint for keeping a "common, ill-governed and disorderly house." The defendant requested the judge to instruct the jury, that the offence complained of "must be such an inconvenience and troublesome offence as annoyed the whole community in general, and not merely some particular person." If by this it was contemplated that actual annoyance must be proved to have been occasioned to more than one particular person, it was incorrect. It was sufficient if the acts of disorder, shown to have been committed or permitted by the defendant in the management of her house, were of such a nature as tended to annoy all good citizens, and did in fact annoy any one. *Commonwealth v. Oaks*, 113 Mass. 8. Such was the instruction given in substance. The presiding judge did not, as the defendant contends, instruct the jury merely, "that, if one person in the neighborhood or community was disturbed or

annoyed, that was sufficient ; ” but added thereto, and as a part of the same sentence, “ that the defendant might be convicted, provided the other circumstances necessary to constitute the offence appeared.”

As the bill of exceptions concedes that the offence was clearly defined to the jury in all material points, other than those objected to, and as the instruction contemplates not only that one person shall have been actually annoyed, but that the other circumstances necessary to constitute the offence shall appear, the defendant was thus to be convicted only upon proof of actual annoyance to one person by acts of disorder of such a character, and under such circumstances, as would tend to annoy all persons similarly situated. To this instruction the defendant had no just ground of objection, and it was all that the case required.

Whether in offences relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, the law presumes that the wife acts under the coercion of the husband when in his presence, need not be discussed. 1 Hawk. P. C. c. 1, § 12. *Dixon's case*, 10 Mod. 336. Roscoe's Crim. Ev. (7th Am. ed.) 986. *Commonwealth v. Lewis*, 1 Met. 151. Assuming this to be so, the instruction on this part of the case was sufficiently favorable to the defendant. There is certainly no such presumption that may not be rebutted. The instructions treated the acts done by the defendant when in the presence of the husband as being *prima facie* under his coercion, and compelled the prosecution to prove that, in keeping and maintaining the house, she did so of her own free will and without coercion by him. *Commonwealth v. Lewis, ubi supra. Commonwealth v. Eagan*, 103 Mass. 71.

Exceptions overruled.

J. B. O'Donnell, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

COMMONWEALTH vs. BOSTON & MAINE RAILROAD.

Middlesex. March 28. — Sept. 21, 1882. ENDICOTT, J., absent. LORD, J., did not sit.

An indictment against a railroad corporation, under the St. of 1874, c. 372, § 163, alleged that at a certain place the railroad crossed a highway upon the same level; that one S. was travelling on the highway and in the exercise of due diligence; that a locomotive engine attached to a freight train was passing the place of intersection; that a locomotive engine was coming in the opposite direction; that while the corporation was thus running the last-named locomotive, it was the duty of the corporation, when approaching said place of intersection, in view of the position of said first-named locomotive and train of cars, to reduce its rate of speed and give proper signals and warnings; but that the corporation neglected to do so, and with said last-named engine ran over and killed said S. *Held*, that the negligence alleged was that of the servants of the corporation, and not of the corporation itself, and that the indictment was insufficient. *Held, also*, that the objections to the indictment were not for formal defects apparent on the face thereof, within the St. of 1864, c. 260, § 2, and could be taken after the jury had been sworn.

A railroad corporation is responsible, under the St. of 1874, c. 372, § 164, for the neglect of its servants to give the signals required by § 123, when crossing a way at the same level.

The St. of 1874, c. 372, § 164, is not limited to cases of injury which do not result in death, but applies as well to cases of loss of life.

The rule, that, where the same offence is charged in different counts of an indictment, the whole indictment may be submitted to the jury, with instructions, if they find the defendant guilty upon any count, to return a general verdict of guilty, is not applicable in a case where one count of the indictment is bad, and the evidence applicable to such count is submitted to the jury with the rest, against the objection of the defendant.

INDICTMENT, in four counts, on the St. of 1874, c. 372, §§ 163, 164, to recover, for the use of the widow and only child of Sherburne T. Sanborn, a fine, by reason of the loss of his life, from being run over, on September 22, 1880, at a place in Wilmington where the defendant's railroad crosses a highway at grade.

At the trial in the Superior Court, before *Gardner, J.*, the judge submitted the case to the jury upon the third and fourth counts only. A general verdict of guilty on these counts was returned; and the defendant alleged exceptions, the substance of which appears in the opinion.

D. S. Richardson & G. F. Richardson, for the defendant.

W. Gaston & S. J. Elder, for the Commonwealth.

C. ALLEN, J. The first question to be considered in this case is, whether the third count of the indictment is good in itself, or is supported by the evidence. The count in substance charges that at a certain place the railroad crossed a highway upon the same level; that one Sanborn was travelling on the highway and in the exercise of due diligence; that a locomotive engine attached to a freight train was passing the place of intersection; that a locomotive engine was coming in the opposite direction; that, while the corporation was thus running the last-named locomotive engine, it was the duty of the corporation, when approaching said place of intersection, in view of the position of said first-named locomotive and train of freight cars, to reduce its rate of speed and give proper signals and warnings; but that the corporation neglected to do so, and with said last-named engine ran over and killed said Sanborn.

This count is founded on the St. of 1874, c. 372, § 163, which imposes a penalty upon the corporation, if, by reason of its negligence or carelessness, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger, or of any person being in the exercise of due diligence, and not being a passenger or in the employment of said corporation, is lost. The count, it will be observed, does not charge the unfitness or gross negligence or carelessness of servants or agents of the corporation, but negligence of the corporation itself.

The distinction between these different grounds of liability to indictment has been observed in all the earlier legislation upon this subject. The statutes respecting liability for the loss of life of a passenger were the St. of 1840, c. 80, and the Gen. Sts. c. 63, § 97; those respecting liability for the loss of life of one not being a passenger were the St. of 1853, c. 414, § 1, and the Gen. Sts. c. 63, § 98. These provisions were blended together in the statute upon which the present count is framed. In all of these statutes, the negligence or carelessness of servants or agents must be gross, while the negligence or carelessness of the corporation itself need not be gross, in order to make the corporation punishable by indictment. This distinction has also been observed in all of the cases which are reported, where indictments have been founded upon either of these statutes. In *Commonwealth v.*

Boston & Worcester Railroad, 11 Cush. 512, the indictment, which was founded upon the St. of 1840, c. 80, alleged gross negligence and carelessness of servants and agents in running a train. In *Commonwealth v. Fitchburg Railroad*, 10 Allen, 189, the indictment, which was founded on the Gen. Sts. c. 63, § 98, contained similar averments. In *Commonwealth v. Vermont & Massachusetts Railroad*, 108 Mass. 7, the indictment, which was founded on the Gen. Sts. c. 63, § 97, contained similar averments; as did also the indictments in *Commonwealth v. Fitchburg Railroad*, 120 Mass. 372, and in *Commonwealth v. Boston & Lowell Railroad*, 126 Mass. 61. The indictment in *Commonwealth v. East Boston Ferry Co.* 13 Allen, 589, which was founded upon the Gen. Sts. c. 160, § 34, imposing a similar liability upon other carriers under like circumstances, set forth that the loss of life occurred through the negligence of the corporation itself, in not providing a suitable drop, connected with the landing-place, for passengers on the boats of the corporation.

It thus appearing that there is a distinction between the negligence or carelessness of the corporation itself, and the gross negligence or carelessness of its servants or agents while engaged in its business, it becomes necessary in framing an indictment to select and set forth with accuracy the ground which is to be relied on. The negligence of the corporation itself is one thing, and the gross negligence of its servants or agents is another thing, and an averment of one is not supported by proof of the other. In many cases, it is true that, as a corporation usually acts by agents, an averment of negligence on the part of a corporation may be supported by proof of negligence on the part of its agents. But this is not applicable to a liability imposed by a statute which expressly distinguishes between the grounds of liability, as does the statute now under consideration. In such a case as the present, negligence on the part of the corporation cannot be established by showing negligence on the part of its servants or agents, and by invoking the aid of a presumption that their negligence must be presumed to have been in pursuance of orders of the corporation itself. The statute makes a plain distinction; the pleader selects the ground on which the liability of the defendant is to be made to rest; a line of precedents recognizes and illustrates the distinction between the

two grounds; and to allow the pleader to select the negligence of the corporation itself as the ground on which its liability is to be maintained, and to support it by proving merely the negligence of servants or agents, and by asking a court or jury to infer the existence of negligence on the part of the corporation from mere proof of negligence on the part of its servants or agents, would be to obliterate the distinction expressed in the statute, and to depart from the common rule of pleading. See *Commonwealth v. Fitchburg Railroad*, 126 Mass. 472.

Looking at the third count of this indictment in the light of these principles, we are of opinion, not only that it was unsupported by the evidence in the case, but that it is not a good count in itself. There was no proof, and there is no averment, that the corporation, by general rule or otherwise, had given to its servants or agents any instructions which were improper or unsuitable, or had so far failed to give proper and suitable instructions that the omission could justly be attributable to it as negligence; but the evidence and, by fair implication, the averment show that the negligence relied on was the omission to do what ought to have been done under the peculiar circumstances of a particular occasion; that is to say, the occasion of a passenger train unexpectedly meeting a freight train at a highway crossing. There is no averment that the corporation fixed the rate of speed for either of the trains as it was run; or that, according to the rules or time-tables of the corporation, the trains were expected or likely to meet at that place; or that such an emergency was likely to happen, and that it was the duty of the corporation to make provision therefor, by suitable rules or instructions to its servants and agents, and that this corporation had neglected to do its duty in this respect; or that the corporation, in view of the special emergency, had it in its power to reduce the speed of the particular train or to give special signals; or that the corporation ought to have provided a gate or flagman at the crossing, for the better protection of travellers; but the averment of negligence is simply that it was the duty of the corporation, in view of the position of the freight train, to reduce the rate of speed of the passenger train, and to give proper signals and warnings. The negligence which is specified is simply the neglect to do what ought to have been done in view of a

present emergency. These acts of negligence appear upon the face of the indictment to be acts of the servants and agents of the corporation, and not of the corporation itself. If the emergency called for a reduction of speed, and the giving of special signals and warnings, there is no presumption that the corporation forbade its servants or agents to make such reduction, or to give such signals and warnings; but it is plain that the omission to do such proper acts, if such omission existed, would *prima facie* be attributable to the servants or agents. If so, in order to hold the corporation responsible for their negligence, it would be necessary, under the statute, to aver and prove that such negligence was gross. In other words, an indictment, which sets forth only such acts of negligence or carelessness as are specified in the third count, must either charge them as acts of gross negligence or carelessness on the part of the agents or servants of the corporation, or must set forth other facts which will have the effect to make the corporation responsible as for its own negligence or carelessness.

If, passing from the averments of the third count, we look into the evidence by which it was sought to be supported, it appears that in point of fact the two trains were not expected to meet at the place where the loss of life occurred, and there was nothing to show that the corporation was responsible for the alleged failure to reduce the speed of the passenger train, or to give signals or warnings, except the evidence which tended to show an omission to do those acts on the part of its servants and agents, and the inference sought to be drawn from such omission.

It was suggested in the brief for the Commonwealth, that no motion was made to quash the indictment for informality, and that under the St. of 1864, c. 250, § 2, it was too late, upon the trial of the case, to raise the objection to this count. Under that statute, an objection for a formal defect, apparent on the face of the indictment, must be taken before the jury has been sworn. The objection to this count is not of that character. There is nothing on the face of this count which would enable the court, on inspection thereof, to determine what should be added or changed, to meet the case intended to be relied on. The statute on which the count is founded allows two kinds of negligence to be set forth: negligence of the corporation, and gross negligence

of its servants or agents. Apparently, the pleader intended to rely on the former; and in that case it is necessary to aver some substantive additional facts in order to show such liability. If, however, the negligence of servants or agents of the corporation was intended to be relied on, the omission of a direct charge that there was gross negligence or carelessness on their part cannot be considered as merely formal. In either case, the objection was well taken at the trial.

The next question to be considered is whether the fourth count is good. This count in substance sets forth that it was the duty of the corporation to give warning of the approach of the passenger train by ringing the bell or sounding the whistle upon the engine continuously for the space of eighty rods before reaching the crossing; that the corporation neglected to do so; that said Sanborn was killed by being run over, as set forth in the first count; and that the neglect to give such warning contributed to his injuries and death. This count is founded on the St. of 1874, c. 372, § 164, which provides, in substance, that if a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a place where the railroad crosses a highway upon the same level, and it appears that the corporation neglected to ring the bell or sound the whistle at the distance of at least eighty rods from the crossing, and thence continuously until the engine has passed the crossing, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment; with further provisions not material to be stated here. Under this section of the statute, which differs in its phraseology from the preceding section, the negligence of servants or agents of the corporation in respect to giving the required warnings is the negligence of the corporation. The statute makes no distinction between the one and the other, but holds the corporation responsible for the performance of the duty which is expressly enjoined by § 123 of the same chapter. The corporation must at all hazards see to it that this is done, and is punishable if it is not done.

But it is contended, on the part of the defendant, that § 164 only applies to cases of injury which do not result in death; and that it does not apply to cases of loss of life. This is the only

objection taken to the form of this count. An examination of the legislation preceding the section in question, and dealing with the same subject, has brought us to the conclusion that this objection is not tenable. It may indeed be open to question, whether the remedy by indictment extends to cases of collision not attended with loss of life. This question we have not considered. But we are all of opinion that this remedy is not limited to such cases. By the Gen. Sts. c. 63, §§ 97, 98, provision was made for imposing a penalty on a railroad corporation, if, by reason of its negligence or carelessness, or of the unfitness or gross negligence or carelessness of its servants or agents, the life of a passenger, or of any person not a passenger, should be lost. These provisions being in force, the St. of 1862, c. 81, made special provision that every railroad corporation should have a bell and a steam-whistle upon each locomotive engine passing upon its road, and that such bell should be rung or such whistle sounded at the distance of at least eighty rods from the place where the railroad crossed a highway upon the same level, and thence continuously until the engine had crossed the highway; but no penalty was provided for an omission to give these warnings. Then followed a statute which, like the preceding, stood by itself alone, the St. of 1871, c. 352, which is the foundation of the St. of 1874, c. 372, § 164, and is in substantially the same language; and it refers in terms to the St. of 1862. Its object was plainly to reënforce that statute, by providing a special liability or penalty in case of a neglect to give the warnings, and of an injury to which such neglect contributed. This particular act of neglect was singled out; it was deemed to be of such significance as to call for special legislation concerning it; and, while the corporation was already liable to a penalty in case of a loss of life occurring through any negligence or carelessness on its part, of whatever nature, or through the unfitness or gross negligence or carelessness of its servants or agents, it was now also made responsible in like manner, if from any cause whatever, whether through negligence or otherwise, there should be an omission to give these warnings when approaching a crossing at grade, and such omission should contribute to the injury. The later statute gives a particular emphasis to the duty which is imposed, of

ringing the bell or sounding the whistle. It stamps the omission of this duty as sufficient to fix the responsibility of the corporation, without any inquiry into the circumstances under which such omission occurred. Prior to the enactment of the St. of 1871, the omission to ring the bell or sound the whistle was merely evidence of negligence on the part of the servants of the corporation. *Commonwealth v. Fitchburg Railroad*, 10 Allen, 190. Since its enactment, such omission fixes the liability of the corporation, irrespective of any question of negligence. The statutory provisions applicable to cases of loss of life have therefore received a distinct and substantive addition by the enactment of the statute in question, and we cannot assent to the argument for the defendant, that the only intention of the Legislature was to add provisions relating to mere injuries to person or property. It follows that the fourth count is good.

In order to support the averments of this count, it was necessary for the Commonwealth to prove an omission to give these warnings, as required by the statute. An indictment properly framed upon § 163 might be supported by proof of any facts duly averred, and satisfactory to the court and jury, to show negligence on the part of the corporation or gross negligence on the part of its servants or agents, even though the bell was rung and the whistle sounded continuously for eighty rods before the engine had reached the crossing. Under the averments of the third count, the jury may have been satisfied that such signals and warnings were given, but that the speed of the passenger train was not reduced, and that it was criminal negligence to omit to reduce the rate of speed, or to keep a proper and sufficient watch, care and foresight.

The presiding judge instructed the jury, that, if they should find, upon either one of these two counts, that the Commonwealth had sustained the burden which was upon it, they must return a general verdict of guilty. The result of this instruction is, that the verdict may have been rendered upon proof of facts charged in the third count, which would not be sufficient to support the fourth count; and so, the third count being now found to be bad, the verdict may have been rendered upon proof of facts not charged in, nor admissible in evidence under, the fourth count, which alone was good.

It is contended, on the part of the Commonwealth, that the practice as adopted in Massachusetts requires, or at least sanctions, the submission of the several counts of an indictment for one offence to the jury in this form.

It cannot be doubted that the two counts under consideration are for the same offence. Each count charges a loss of life of a person not a passenger, by being run over by the engine, at a grade crossing, and seeks to impose on the corporation the same penalty, and for the benefit of the same persons. Each count rests on an averment of negligence on the part of the corporation, or of its servants or agents. The difference in the details of the negligence charged does not have the effect to show that two offences are charged. And it is no doubt a general and beneficial rule of practice, that, where the same offence is charged in different counts of an indictment, the whole indictment may be submitted to the jury, with instructions, if they find the defendant guilty upon any count, to return a general verdict of guilty. But this rule is not applicable where one count of the indictment is bad, and the evidence applicable to such bad count is submitted to the jury with the rest, against the objection of the defendant. All such general rules of practice must yield, whenever it appears that the just rights of the defendant are insufficiently protected by them.

Ordinarily, no difficulty is found to arise. Where there are several good counts, and confusion is feared, it is indeed open to the defendant to move the court, before the commencement of the trial, to require the prosecutor to elect on which count or counts he will proceed, and to discontinue as to the residue; or such motion and order may be made upon the conclusion of the evidence for the Commonwealth; or the court, in its discretion, may instruct the jury to ascertain and determine, if they find the defendant guilty, on which count they so find, and accordingly to render a verdict of guilty on that count, and not guilty on the others; or it is competent for the court, and perhaps this is the best course to pursue generally, to give particular instructions to the jury as to the application of the evidence to the several counts, and that certain evidence can only be considered as bearing upon a certain count, and leave it to the jury to make a correct application of the evidence under such instructions, and

to return a general verdict of guilty, provided either count is proved. The latter mode is, in practice, usually found to be free from objection, and to secure a proper administration of justice.

But this course cannot advantageously be pursued when the objection is raised at the trial that either count in the indictment is insufficient in form; because in such case, if the whole indictment is submitted to the jury, with all the evidence applicable to each count, and a general verdict of guilty is rendered, and it proves that one count is bad, it cannot be known with certainty but that the jury have found their verdict upon the bad count, and upon evidence which is applicable to that count alone. If a general verdict of guilty is taken, without any objection being raised as to the sufficiency of either count, or any request for special instruction as to the evidence in support of either count, such general verdict will afterwards be deemed applicable to any count or counts which may be found to be sufficient. It is therefore a matter of necessity for the defendant, if he questions the sufficiency of either count, to ask appropriate rulings before the case is submitted to the jury; and when such question is made, and a general verdict of guilty is taken, and either count is afterwards found to be insufficient, there is danger that it may be necessary, as in the present case, to set aside the verdict. This exception to the general rule is recognized and stated in the elaborate and excellent exposition of the law upon this general subject, by Mr. Justice Dewey, in *Commonwealth v. Desmarteau*, 16 Gray, 1, 11, 17. The case of *Commonwealth v. Fitchburg Railroad*, 120 Mass. 372, holds that it is irregular, where there are several counts for the same offence, to take a verdict of guilty on more than one count. In that case, we have looked at the original papers, and an examination of the exceptions upon which the case was submitted to this court shows that no objection was raised at the trial before the jury to the sufficiency of either count of the indictment, and the decision upon that point is not of direct application to the present case.

Inasmuch as the fourth count only is found to be good, and as the general verdict of guilty may have been found upon proofs applicable only to the third count, the

Exceptions are sustained.

COMMONWEALTH vs. RICE E. SOPER.

Franklin. Sept. 19. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

An indictment for perjury alleged that, on the third day of January, a complaint was made before a trial justice against T., charging him with a certain offence; that T. was arrested and brought before the justice and an examination had upon the complaint on the said third day of January; and that at such examination the defendant committed the perjury for which he was indicted. Upon the production of the record of the trial justice, it appeared that the complaint against T. was dated on the thirty-first day of December, but that the arrest and examination were on the said third day of January following. *Held*, that, under the Pub. Sts. c. 214, § 26, there was no material variance between the allegations of the indictment and the proof.

INDICTMENT for perjury. At the trial in the Superior Court, before *Knowlton, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

J. McIlvene, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. The indictment alleges that, on the third day of January, 1882, a complaint was made before William S. Dana, a trial justice, against one Thompson, charging said Thompson with larceny; that Thompson was arrested and brought before the justice, and an examination had upon the complaint on the said third day of January; and that, at such examination, the defendant committed the perjury for which he is indicted. Upon the production of the record of the trial justice, in support of the indictment, it appeared that the complaint against Thompson was dated on the thirty-first day of December, 1881, but that the arrest and examination were on the said third day of January.

The defendant asked the judge to rule that there was a fatal variance between the allegations and the proofs. We are of opinion that the judge rightly refused so to rule.

Without discussing the question as to what might be the rule at common law, it is clear that, under our statutes, there is no material variance of which the defendant can avail himself. Pub. Sts. c. 214, § 26. There is no room to doubt that the

complaint offered in evidence is the same as the one described in the indictment. In the words of the statute, "the identity of the instrument is evident, and the purport thereof is sufficiently described to prevent all prejudice to the defendant."

The variance therefore cannot be deemed material. *Commonwealth v. Hall*, 97 Mass. 570. *Commonwealth v. McKean*, 98 Mass. 9. *Commonwealth v. Hatfield*, 107 Mass. 227.

Exceptions overruled.

COMMONWEALTH vs. OWEN F. MCMAHON.

Hampshire. Sept. 19. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

A complaint to a trial justice by "A. W. T." alleged that the defendant, "on the twenty-fifth day of May," committed a certain offence; was dated "this twenty-fifth day of June;" and was signed by "A. W. K., complainant." The jurat was dated "this twenty-fifth day of May." The warrant issued by the trial justice directed the officer to arrest the defendant, to answer "on the foregoing complaint of A. W. K., this day made on oath before me;" and was dated "this twenty-fifth day of May." The return of the officer stated that he arrested the defendant "on June 1st." The record further showed that a hearing was had on the complaint before the magistrate on June 3, and the defendant was adjudged guilty and sentenced. *Held*, that the errors in the complaint were merely clerical ones, which could not mislead or prejudice the defendant, and furnished no ground for an arrest of judgment.

COMPLAINT to a trial justice, by "Austin W. Thayer," alleging that the defendant, "on the twenty-fifth day of May," 1882, at Ware, unlawfully kept intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth; was dated "this twenty-fifth day of June," 1882; and was signed by "Austin W. Kellogg, complainant." It was sworn to by Austin W. Kellogg; and the jurat was dated "this twenty-fifth day of May," 1882. The warrant issued by the trial justice directed the officer to arrest the defendant, to answer "on the foregoing complaint of Austin W. Kellogg, this day made on oath before me;" and was dated "this twenty-fifth day of May," 1882. The return of the officer stated that he arrested the defendant "on June 1st, 1882." The record further showed that a hearing was

had on the complaint before the magistrate on June 8, 1882, and the defendant was adjudged guilty and sentenced; from which sentence he appealed to the Superior Court.

In that court, after a verdict of guilty, the defendant moved in arrest of judgment, "because the trial justice had no lawful jurisdiction to try the defendant upon the complaint, the said complaint not having been sworn to by the proper complainant, and because it was sworn to long after the arrest and trial of this defendant on said complaint, and because this court has no jurisdiction to try said complaint on appeal." This motion was overruled; and the defendant appealed to this court.

C. Delano, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. Neither of the reasons assigned for arresting the judgment can prevail. The complaint is dated by mistake on the twenty-fifth day of June, 1882; but the dates of the jurat and of the warrant show that it was made and sworn to on the twenty-fifth day of May, 1882, thus furnishing internal and plenary evidence that the complaint was duly made before the arrest and trial, and that the date of the complaint was a mere clerical error, which could not mislead the defendant. *Donahoe v. Shed*, 8 Met. 326.

The mistake in describing the complainant in the body of the complaint as "Austin W. Thayer" was also clearly a clerical one. The signature to the complaint, the jurat and the warrant show that the complainant was Austin W. Kellogg. Such a clerical error, which cannot mislead or prejudice the defendant, furnishes no reason for arresting the judgment against him. *Commonwealth v. Egan*, 103 Mass. 71. *Commonwealth v. Randall*, 4 Gray, 36.

Judgment affirmed.

COMMONWEALTH *vs.* FRANCIS A. BEALS.

Hampshire. Sept. 19. — Oct. 20, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

A parent, to whom the custody of his child has been awarded upon the termination of a divorce suit, may be convicted of an assault and battery, if, in endeavoring to effect an entrance into a house in which the child has been placed, for the purpose of obtaining possession of the child, he uses intentional force upon the person of the occupant of the house, in order to overcome resistance by the latter to his entrance.

INDICTMENT for assault and battery upon Eveline M. Manchester. Trial in the Superior Court, before *Dewey, J.*, who allowed a bill of exceptions, in substance as follows :

There was evidence tending to show that the wife of the defendant brought a libel for divorce against him, which, after a hearing on the merits, was dismissed, and was the final disposition of the case ; that the wife, on commencing proceedings, separated from the defendant, and took with her, and kept during the pendency of the libel, the younger of their two children, aged seven years, at the house of the husband of said Manchester in Northampton, where the latter lived with her husband, and where the libellant boarded ; that the other child remained with the defendant ; that after the dismissal of the libel, the counsel for the libellant immediately moved the court that the custody of the younger child be awarded to her ; that the presiding judge remarked that he had seen nothing in the course of the testimony which would lead him to give the child to the mother, or to separate the children, and refused the motion ; that thereupon the defendant with a friend drove to the house of said Manchester to get the younger child ; that the defendant remained in the carriage, while his friend went to the door, rang the bell, and told Manchester, who came to the door, and who knew about the divorce proceedings, and knew the defendant and that he was the father of the child, that the divorce case had been decided in favor of the defendant, that he was entitled to the custody of the younger child, who was then in the house, and that they had come for him ; that Manchester replied that they could not have the child without papers from the court ;

that the defendant then stepped upon the piazza and was told by Manchester that he could not have the child and could not enter the house; if he did, it would be a trespass; that Manchester then stood on the threshold of the outer door, which was a single door, at the side opposite the hinges, with the partly open door behind her, holding on to the outside knob of the door with one hand; that the defendant pressed his shoulder against the door and thereby forced the knob out of her hand, and the door opened wider; that, without touching her, he passed between her and the door, thus swung open, into the house, and took the child, who ran to him to go with him, and carried him from the house; that the sole motive of the defendant in going to the house and doing all that was done was to get his child; that no other force or violence or menace was used by the defendant or his friend than as above recited, and no more than was absolutely necessary to get the child, and no noise or outcry was made. Manchester contended and testified that the defendant placed his hands violently upon her shoulders and pushed her over; and two other witnesses testified that the defendant placed his hands against the person of Manchester.

The defendant asked the judge to rule as follows: "If Mrs. Manchester held the defendant's child in custody in her house, and refused to surrender the child to the defendant on the proper application of the defendant, he was justified in using as much force, suitable in kind, as was necessary to get possession of his child, if he did not commit a breach of the peace. If the pushing of the door by the defendant was with no intention by him of injury to Mrs. Manchester, and she wilfully held the door, and the defendant's sole object was to get his child, any resulting injury would not be an assault, if the defendant used no more force than was necessary to get the child, after she refused to surrender him. If the defendant merely pushed open a door to which Mrs. Manchester clung, and of which she might have let go, then the injury, if any, which she received was not an assault by the defendant, if there was no intention of injuring Mrs. Manchester. Such force as was suitable in kind and necessary in degree only, applied for the sole purpose of getting possession of the child, without a purpose to injure Mrs. Manchester, would not be an assault and battery."

The judge declined so to rule; and, after defining an assault and battery, instructed the jury as follows: "If the defendant was guilty of an assault and battery on Mrs. Manchester, it is not a justification that he was entitled to the possession of the child who was in the house occupied by Mrs. Manchester, and that he could not enter the house without committing the assault and battery. If the defendant's hands were placed unintentionally or casually upon the person of Mrs. Manchester, or if pressing against the door had the effect unintentionally or casually to force it against her, this would not constitute an assault and battery."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. G. Bassett, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

W. ALLEN, J. The evidence with reference to which the instructions which were refused were asked, and the instructions excepted to were given, was that, after Mrs. Manchester had forbidden the defendant to enter her dwelling-house, and while she was in the house opposing his entrance, he used force upon her person in order to overcome her resistance and enter the house.

The defendant contends that he had a right to the custody of his child; that the child was detained from him by Mrs. Manchester in the house; that his only object in entering the house was to obtain the child; and that he had a right to enter for that purpose, and to use necessary and reasonable force to overcome resistance to his entrance. But we think that the right to the custody of the child, if the defendant possessed it, gave him no right to enter the house when opposed by the occupant; and that the intentional use of force upon Mrs. Manchester, in order to overcome her resistance and effect an entrance, was unlawful. The instructions given were to this effect, and were correct: and the instructions asked were properly refused.

Exceptions overruled.

COMMONWEALTH vs. ALFRED R. BARKER.

Hampden. Sept. 26. — Oct. 10, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

A person, who has been arrested on mesne process, admitted to bail, and afterwards surrendered by his bail to the keeper of a jail, is "lawfully imprisoned," within the Gen. Sts. c. 178, § 46; and, if he forcibly escapes from the jail, he may be convicted, under said statute.

INDICTMENT, on the Gen. Sts. c. 178, § 46, alleging that the defendant, on August 6, 1881, being lawfully imprisoned in the jail established by law in Springfield, did break therefrom and escape, and go at large. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions, in substance as follows:

The defendant was arrested and held on mesne process in a civil action, at the suit of Montraville Ackert. He was immediately admitted to bail, and was afterwards surrendered by his bail to the keeper of the jail, and a copy of the bail bond delivered to the keeper, with the following indorsement, signed by a deputy sheriff, thereon: "By virtue of the within precept, I have this day arrested and delivered to A. M. Bradley, the keeper of the jail in said county, the body of Alfred R. Barker." After the defendant had been so committed to jail, he escaped therefrom. It was admitted that he had never been taken before any magistrate, and that he had not been committed to jail by any magistrate or court.

The defendant asked the judge to rule as follows: "1. Unless it appears that the defendant had been technically committed to jail, his breaking therefrom would not constitute jail breach. 2. The surrender of the principal by the bail to the keeper of the jail does not of itself amount to such a commitment as is essential to lawful imprisonment in jail, and as is essential to render breaking therefrom punishable under the statute. 3. The surrender of the principal by the bail does not of itself impose a greater liability or disability on the defendant than he was under when in the hands of the officer who arrested him on the original writ. 4. The officer who arrested the defendant on the original writ could not technically commit the defendant to jail, so that

he would be therein lawfully imprisoned within the meaning of the statute, and so, that breaking therefrom would be punishable, as herein charged. 5. Unless it appears that the defendant was committed to jail by some magistrate or officer having judicial authority to commit, he was not lawfully imprisoned in jail within the meaning of the statute under which the prisoner is being tried. 6. The forcibly breaking from jail of a person confined therein on mesne process in a civil cause does not constitute an offence against the statute under which the indictment is drawn."

The judge declined so to rule. The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. C. Bliss, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

DEVENS, J. The imprisonment of the defendant was certainly lawful, as he was surrendered by his bail to the keeper of the jail, and a copy of the bail bond lodged with him. Gen. Sts. c. 125, § 15. But although within the words of the statute (Gen. Sts. c. 178, § 46), which prescribe a punishment for every one who, "lawfully imprisoned in any place of confinement established by law, other than the state prison, breaks therefrom and escapes," he contends that he is not within its meaning and intent. He argues, that, as the jails of the Commonwealth are to be used only for the confinement of certain persons "committed" for various causes enumerated (which would not include the defendant), and "of all other persons committed for any cause authorized by law" (Gen. Sts. c. 178, § 1), the word "committed" is to be taken as having a technical meaning, and necessarily implies a warrant or order by a court or magistrate directing a ministerial officer to take a person to prison; and that the offence of breaking jail can only be committed by those properly thus described, for it is only as to them that the jail is a lawful place of confinement.

An examination of the statute on the subject of bail (Gen. Sts. c. 125) shows that the surrender by his bail of a person who has been arrested on civil process is there spoken of as a "commitment," and he himself as a "prisoner" who has been "committed." Thus, by § 16, a copy of the bail bond is required to

be deposited with the jailer, which protects him, "although the surrender and commitment prove to be unlawful on the part of the bail." By § 18 of the same chapter, the bail are required to give "notice in writing to the plaintiff or his attorney, of the time when and the place where the prisoner was so committed." Nor is the proceeding by which a prisoner is surrendered upon civil process without an instrument which fulfils the office of a warrant. When one becomes bail, he is entitled forthwith to an attested copy of the bail bond, upon which he may seize and take his prisoner whenever he will; and this is his warrant, as well as that of the jailer, when the surrender is made to him. *Jones v. Varney*, 8 Cush. 187. The defendant was therefore a person committed to jail for a cause authorized by law.

It is further urged, that the forcible breaking from jail of a person confined therein on mesne process was not an offence at common law; and that therefore it cannot have been intended to constitute it an offence against the statute under which this indictment is drawn. We are by no means prepared to assent to the proposition that breaking jail, by one confined on mesne process, was not an offence at common law. 1 Hale P. C. 608. 2 Hawk. P. C. c. 17, § 5, and c. 18, § 1. 2 Inst. 589. Whart. Crim. Law (8th ed.) § 1673. *State v. Murray*, 15 Maine, 100. However this may be, the generality of the phrase "lawfully imprisoned" indicates clearly the intention to punish every violation of custody by those who are properly held in any place of confinement established by law other than the state prison. Breaking jail and an escape therefrom, even by a prisoner confined therein on mesne process, could not be otherwise than an outrage to its discipline, and a resistance to the lawful authority by which he was detained. *Exceptions overruled.*

COMMONWEALTH vs. MONTRAVILLE ACKERT.

Hampden. Sept. 26. — Oct. 19, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

At the trial of a criminal case, an accomplice, who was a witness for the government, testified to the guilt of himself and of the defendant; and, on cross-examination, also testified that he made a confession of his guilt to the officer who arrested him; that such confession was induced by promises, on the part of the officer, of protection and favor; and that the confession was true. *Held*, that the government might show, by the testimony of the officer, that the confession was voluntary.

INDICTMENT for inciting one Elvira Makely to burn the defendant's dwelling-house in Brimfield, with intent to injure and defraud an insurance company. Makely was indicted for the same burning, and was also jointly indicted with the defendant for burning the said dwelling-house, with intent to injure and defraud an insurance company.

At the trial in the Superior Court, before *Rockwell, J.*, Makely was introduced by the government as a witness, and testified in substance that she burned said dwelling-house, knowing it to be insured at the time alleged, having been incited and persuaded so to do by the defendant, to injure and defraud the insurance company; that the defendant, for more than a year, "had been at work upon her" to induce her to do the act; that, on the night of the burning, the defendant had arranged to be and was away; and that she set the fire in the manner directed by him before he went away.

Upon cross-examination, she testified that, at the time of her arrest, she made a true confession of what she had done to one Jason A. Palmer, a deputy sheriff, who had her in custody, and before her examination in the District Court; that she was induced to make such confession by reason of promises of protection and favor given by the officer to her, and because of representations made by him that "it would be better for her to put the whole thing upon Ackert, and then she would get clear;" that, among other things, the officer promised her that, if she would confess, he would be her bail; that, at the time she made the confession, she was agitated and frightened, and did not

know what to do, and had no counsel or opportunity to procure counsel; that the confession made to Palmer was in all respects true, and was just what she had testified to in this case; and that she had only made up her mind to make her present confession about an hour before she was called to the stand. It also appeared, on cross-examination, that Makely had been convicted of burning said house, she not testifying; but said verdict was set aside, and a new trial granted. See 131 Mass. 421.

The government, after Makely had been cross-examined, called the officer as a witness, who testified that the confession made at the time of the arrest was not made to him by reason of any representations or promises of favor or protection, or of his promise to go bail for her; that he made her no such promises; but that the confession was a voluntary one. The defendant objected to this testimony; but the judge admitted it.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. H. Lathrop, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

C. ALLEN, J. The witness, a *particeps criminis* in respect to the burning, having been examined as a witness on the part of the Commonwealth, and having testified to the guilt of herself and of the defendant, was asked on cross-examination as to a previous confession by her of such guilt, and stated that she had made such confession to an officer, and that she was induced to do so by promises on his part of protection and favor. She also still maintained that her confession, though procured by such promises, was true. The argument, however, would be open to the defendant, that her confession, if so procured, was not true; that she had been induced by the promises to commit herself to a confession which was false; and that, if her confession was false, her present testimony to the guilt of the defendant was also false. The connection between her confession and her present testimony was such, that this argument would be a fair one for the consideration of the jury. Selling a confession would be a legitimate ground for distrusting its truth. She declared virtually that her confession was sold. It thus became material to know if she was in fact induced to make the confession by

promises. If she was, the weight of her present testimony to the defendant's guilt was impaired. If she was not, and if her confession was voluntary, her testimony to his guilt was strengthened. The defendant introduced this issue, seeking to obtain the legitimate advantage of the implied impeachment of the witness. It was proper to allow the government to meet the issue, by showing that the confession was voluntary. It is always competent, and often important, to ascertain the motive or bias under which a witness testifies. Everything which goes to affect his credit, as to the particular facts to which he is called to testify, is material and admissible. *Commonwealth v. Hunt*, 4 Gray, 421. *Day v. Stickney*, 14 Allen, 255. The testimony of the witness, that her original confession was made under a strong motive or bias, being material, it was competent for the goverment to contradict it. Pub. Sts. c. 169, § 22.

Exceptions overruled.

COMMONWEALTH vs. NAPOLEON AUBERTON.

Hampden. Sept. 26. — Oct. 20, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

The Pub. Sts. c. 100, § 12, providing that no licensee shall maintain, or permit to be maintained, upon any premises used by him for the sale of spirituous or intoxicating liquor under the provisions of his license, any screen, blind or other obstruction, in such a way as to interfere with a view of the business conducted upon the premises, applies to a licensee carrying on business upon the Lord's day, in violation of the conditions of his license.

A complaint, alleging that the defendant, at a time and place named, being then and there duly licensed according to law to sell intoxicating liquors in a certain building, "did then and there wilfully and unlawfully place and maintain, and authorize to be placed and maintained, upon said premises used by him for the sale of intoxicating liquors under the provisions of his license as aforesaid, certain screens, blinds, shutters, partitions and other obstructions, which interfered with a view of the business conducted upon said premises," sets out an offence under the Pub. Sts. c. 100, § 12.

A complaint, under the Pub. Sts. c. 100, § 12, alleged that the defendant was licensed to sell intoxicating liquors in a certain building; and that he unlawfully maintained, "upon said premises used by him for the sale of intoxicating liquors under the provisions of his license, certain screens, blinds, shutters, partitions and other obstructions." It appeared in evidence at the trial, that the defendant

maintained in a window of the premises, outside the sash, a frame covered with wire netting, which was submitted to the inspection of the jury. The defendant asked the judge to instruct the jury that they could not convict, "unless they should find the article complained of and exhibited to them to be a screen or other article specifically named in the complaint;" which instruction the judge gave, with this qualification, "or something in the nature of a screen." *Held*, that the defendant had no ground of exception.

COMPLAINT to the Police Court of Holyoke, alleging that the defendant, on March 5, 1882, at Holyoke, being then and there duly licensed according to law to sell intoxicating liquors in a certain building, "did then and there wilfully and unlawfully place and maintain, and authorize to be placed and maintained, upon said premises used by him for the sale of intoxicating liquors under the provisions of his license as aforesaid, certain screens, blinds, shutters, partitions and other obstructions, which interfered with a view of the business conducted upon said premises," &c. Trial in the Superior Court, on appeal, before *Knowlton, J.*, who allowed a bill of exceptions, in substance as follows:

The defendant was a common victualler, duly licensed to sell intoxicating liquors upon the premises described in the complaint. It appeared in evidence that the act complained of was committed on the Lord's day, and consisted of maintaining in a window of said premises, outside the sash, a frame covered with wire netting, which was submitted by the defendant to the inspection of the jury.

The defendant asked the judge to rule that, it being unlawful for the defendant to do business upon said premises on the Lord's day, he had a right to close up the premises, and obstruct the view to them in any way he saw fit.

The judge refused so to rule; but, against the defendant's objection, instructed the jury that the law applied to the manner in which the defendant kept the premises, the same upon the Lord's day as upon any other.

The defendant also asked the judge to instruct the jury that they could not convict, unless they should find the article complained of and exhibited to them to be a screen or other article specifically named in the complaint; which instruction the judge gave, with this qualification, "or something in the nature of a screen." To this qualification the defendant objected.

After a verdict of guilty, the defendant filed a motion in arrest of judgment, "for the reason that no offence is set out in the complaint upon which said judgment is founded." This motion was overruled; and the defendant alleged exceptions.

H. C. Bliss, (J. Allen with him,) for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

W. ALLEN, J. The defendant's license was made by statute subject to various conditions, such as that he should not keep a public bar; that he should hold a license as a common victualer or innholder; that no sale of intoxicating liquor should be made between the hours of twelve at night and six in the morning, nor on the Lord's day; that no sale of liquor should be made to an intoxicated person or to a minor; and that there should be no disorder or illegal gaming on the premises. The defendant contends that the effect of the condition that no sale should be made on the Lord's day is, that he was not licensed to sell on that day, and was therefore, although actually engaged in selling intoxicating liquor, not acting as licensee, nor carrying on the licensed business at the time he committed the act complained of; and that the prohibition against placing an obstruction so as to interfere with a view of the business conducted upon the premises, in the Pub. Sts. c. 100, § 12, is limited to an act done by a licensee while carrying on the business under his license.

One purpose of the prohibition is to expose violations of the conditions of the license; and to hold that it applies only when the business is carried on according to the conditions, and does not apply when it is carried on in violation of them, would do violence to the language of the statute, and defeat its obvious intent. The instructions asked were therefore properly refused.

The motion in arrest was properly overruled; and the instructions given in regard to proof of the obstruction were correct.

Exceptions overruled.

COMMONWEALTH vs. THOMAS F. DONAHOE.

Plymouth. Oct. 17. — 23, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

Under the St. of 1869, c. 425, a party producing a witness may contradict his testimony upon any matter material to the issue, by showing that he has made at other times statements inconsistent with his present testimony, having first mentioned to the witness the circumstances of the statement sufficient to designate the occasion on which it was made.

INDICTMENT under the Gen. Sts. c. 87, §§ 6, 7, for keeping and maintaining a common nuisance, to wit, a certain tenement in Abington, used for the illegal sale and illegal keeping of intoxicating liquors, on May 1, 1881, and on divers other days and times between that day and October 26, 1881. Trial in the Superior Court, at October term 1881, before *Brigham, C. J.*, who allowed a bill of exceptions, in substance as follows:

The government called one Andrew J. Dunham as a witness, who testified that he did not think he had bought any intoxicating liquor at the defendant's place between May 1 and October 1, 1881.

The government then asked him if he did not tell one Nash, (an officer, who had previously testified in behalf of the government,) "a week ago last Monday," that he had bought rum or whiskey there since May 1; to which the witness replied that he told him something to that effect, but that he could not tell whether it was before or since that date. Upon the question being repeated, the witness denied that he had made such statement to Nash.

The government then recalled Nash, and asked him, "if, a week ago last Monday in the cars, Andrew J. Dunham said anything about purchasing whiskey or rum since May 1, and prior to October 21, 1881." To this question the defendant objected. The objection was overruled, and the witness replied that Dunham stated in the cars that he had bought rum or whiskey of the defendant, that he could not tell what date it was, but it was since May 1, and the last purchase was less than a month ago.

Dunham was then asked by the government, "if a week ago last Monday he did not tell Nash in the cars that the defendant had offered him money, if he would not testify against him in

this case." To which he replied, that he did not tell Nash a week ago last Monday in the cars, that the defendant had offered him money; "I told him that he would rather give me back some money which I claimed belonged to me, than have me testify against him." On cross-examination, he testified, "I did not tell Nash that the defendant had paid me a cent. He had not offered to pay me a cent."

The government then recalled Nash, and asked him, "if, a week ago last Monday in the cars, Andrew J. Dunham said anything to him about the defendant having offered to pay Dunham money, if he would not testify against the defendant in this case." To this question the defendant objected. The objection was overruled, and the witness replied that "Dunham said the defendant had offered to give back money he had got of his, if he would not testify against him."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. H. Osborne, for the defendant.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. Under our practice, a party producing a witness has the right to contradict his testimony upon any matter material to the issue, by showing that he has made at other times statements inconsistent with his present testimony, having first mentioned to the witness the circumstances of the statement sufficient to designate the occasion on which it was made. St. 1869, c. 425. Pub. Sts. c. 169, § 22. *Ryerson v. Abington*, 102 Mass. 526. *Force v. Martin*, 122 Mass. 5.

In the case at bar, one Dunham, called by the government, testified that he did not think he had bought any liquor at the defendant's place between May 1 and October 1, 1881. This was material testimony, and the government had the right to contradict it, by showing that he had told Nash that he had bought liquor there between May and October, the prosecuting officer having first laid the foundation for the evidence by mentioning to the witness the occasion on which the statement was made.

So the testimony of Dunham, that the defendant had not offered to pay him money, if he would not testify against the

defendant, was material; and it was competent for the government, upon the same conditions, to prove that Dunham had made contradictory statements.

Both questions put by the government to Nash were therefore competent. *Exceptions overruled.*

HENRY COLT & others, executors, vs. EDWARD LEARNED & another.

Berkshire. Sept. 12. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

If two parties to a written contract, whose liability is several, are joined as defendants in one action thereon, under the Gen. Sts. c. 129, § 4, and one of them dies, his executor may be summoned in to defend the action as against him.

CONTRACT in two counts, under the Gen. Sts. c. 129, § 4, by the executors of William Pollock against Edward Learned and Theodore Pomeroy. The first count of the declaration was as follows:

“And the plaintiffs say that they are the executors of the last will of William Pollock, late of Pittsfield, in said county, deceased, and that in his lifetime the said Pollock loaned to the Niwat Mining Company, upon the twenty-fifth day of July, A. D. 1865, fifteen thousand dollars, to be repaid to said Pollock in three months from that date, and in consideration that said Pollock would make said loan, the said Learned and said Pomeroy and Pollock, at the time said loan was made, severally executed a contract in writing, a copy whereof is hereto annexed. And the plaintiffs say that upon the sixteenth day of December, A. D. 1865, the sum of five hundred and twenty-five dollars was paid upon said loan, and that the balance of said loan remains unpaid and is still due, with interest, notwithstanding the time for the payment of said loan has long since elapsed.

“And the plaintiffs say that, by virtue of said written contract, the said Learned assumed and guaranteed to said Pollock the payment of one third part of said loan, with interest, if

not paid by the said Niwat Mining Company at the time when payable as aforesaid; and the plaintiffs say that no part of said loan has been paid by said company, or other person, except as aforesaid, and that the said Learned owes the plaintiffs in their said capacity one third part of the aforesaid balance, with interest."

The second count declared against Pomeroy in the same terms as the first count.

The copy annexed was as follows: "Pittsfield, July 25th. 1865. William Pollock having this day loaned the Niwat Mining Company fifteen thousand dollars, payable three months from this date, we, for value received, hereby jointly and severally guarantee the repayment of said loan and interest at the time the same shall be payable as aforesaid. Edward Learned. Theo. Pomeroy, Wm. Pollock."

The defendant Pomeroy died on September 26, 1881, and his death was suggested on the record; and his executors, who were duly appointed on November 9, 1881, were summoned to appear at the February term 1882 of the Superior Court, to answer to and defend the action as against Pomeroy. They appeared specially at said term, and filed an answer setting up "that they ought not to be compelled to appear and take upon themselves the defence of said suit, because the statute in such cases made and provided requires that, upon the death of said Theodore Pomeroy, said action shall proceed against the surviving defendant, and does not provide that, in case one of the defendants survives, the action may be prosecuted against the executors or administrators of the deceased defendant, and the said executors aver that said defendant Edward Learned still survives, and that the court has no power, jurisdiction or authority to summon in said executors to defend said action."

At the hearing upon this answer, *Blodgett, J.* ruled in accordance with the claims therein set up, and ordered the action dismissed as against the executors of Pomeroy; and the plaintiffs alleged exceptions.

M. Wilcox, for the plaintiffs.

T. P. Pingree & J. M. Barker, for the defendants.

MORTON, C. J. It was decided in *Colt v. Learned*, 118 Mass. 380, that the written contract upon which this suit is brought

did not create a joint liability of the several signers, but that each was severally liable for \$5000.

After that decision, the plaintiff brought this suit, under the Gen. Sts. c. 129, § 4, containing two counts, one against each defendant counting on his several contract. One of the defendants, Theodore Pomeroy, has died since the suit was commenced; and the question presented by this bill of exceptions is whether his executors can be summoned in to defend the action.

The statutes provide that "in personal actions, the cause of which survives, if there is only one plaintiff or defendant, and the sole plaintiff or defendant dies after the commencement of the action and at any time before final judgment, the action may proceed and be prosecuted by or against the surviving party and the executor or administrator of the deceased party;" and the executors or administrators may appear or be summoned in to prosecute or defend the action; but "when there are several plaintiffs or defendants in a personal action the cause of which survives, and any of them die before final judgment, the action shall proceed at the suit of the surviving plaintiff, or against the surviving defendant, as the case may be." Pub. Sts. c. 165, §§ 5-13. Gen. Sts. c. 127, §§ 5-12. Rev. Sts. c. 93, §§ 1-13.

This distinction arose out of the fact that at common law, in case of a joint contract, if one of the joint contractors died, an action at law could not be brought or prosecuted against his executor, and in case of a joint and several contract, the executor could not be sued jointly with the survivors because he is to be charged *de bonis testatoris* and they *de bonis propriis*. *New Haven & Northampton Co. v. Hayden*, 119 Mass. 361.

The purpose of the Legislature was to provide that, when a deceased person was the sole party to a cause of action, his executor or administrator might appear or be summoned in to prosecute or defend the suit.

In 1851, the Legislature enacted that persons severally liable upon contracts in writing may all, or any of them, be joined in the same action, the declaration to include only one count when the same contract was made by each, or several counts, describing the different contracts of the defendants, when the same contract was not made by all; and provided that the court should

take such order for the separate trial of the issues, as should be found most convenient, and should enter several judgments according to the several contracts of the defendants. St. 1851, c. 233, § 3. Gen. Sts. c. 129, § 4. Pub. Sts. c. 167, § 4.

The purpose of this statute was to establish a rule of pleading, which enables a plaintiff to join in the same suit persons severally liable upon the same written contract, who before its passage must have been sued in separate actions. It enables a plaintiff to consolidate several actions in one. It was not intended to change the rights of parties to contracts, or to affect the remedies against the representatives of deceased parties. As stated in *Fuller v. Morse*, 4 Gray, 294, it made no change in the legal rights of parties to contracts, except that it permitted them to be determined under one process, instead of compelling a party seeking redress to resort to several actions. *New Haven & Northampton Co. v. Hayden*, *ubi supra*. *Grocers' Bank v. Kingman*, 16 Gray, 473.

The plaintiff in this case had the right to sue the signers of the contract separately, or to join them in one process. By joining them, he could not defeat the right of the executors of one who might die to come in and defend, nor would he deprive himself of the right to summon them in.

The reasons for not permitting executors of a joint contractor to be made a party do not exist, as the court can take order for a separate trial, and can enter separate judgments in the same manner as if there were separate suits. We are of opinion, therefore, that, by the fair construction of the statutes, the plaintiff had the right to summon in the executors of Theodore Pomeroy to defend the action against their testator.

Exceptions sustained.

WALLACE W. LANGDON vs. BILLINGS PALMER.

Berkshire. Sept. 12. — Oct. 3, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

A commissioner, appointed by the Probate Court to make partition of land between two tenants in common, who has not been paid for his services, is not entitled, under the Gen. Sts. c. 136, § 59, to recover, as money received to his use, one half of the amount of the charges for his services, from the tenant collecting of the other tenant, upon an execution issued therefor, one half of the expenses and charges allowed by the court, although the amount sued for is included in the sum collected.

CONTRACT in two counts, the first upon an account annexed, and the second for money received by the defendant to the plaintiff's use. At the trial in the Superior Court, before *Mason, J.*, the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

H. C. Joyner, for the plaintiff.

E. T. Slocum, for the defendant.

W. ALLEN, J. The Gen. Sts. c. 136, § 59, relating to the partition of land in the Probate Court, provide that "the expenses and charges incurred shall be ascertained and allowed by the court, and paid by all the parties interested in the partition in proportion to their respective shares or interests in the premises. If any one neglects to pay his part, an execution therefor may be issued against him."

In the case at bar, partition was made by the Probate Court on the petition of one of two tenants in common in equal proportions, and judgment was entered in favor of the petitioner against the respondent for one half of the expenses and charges, and execution was issued therefor, which recited that the whole of the expenses and charges had been paid by the petitioner; and the amount due on the execution was collected and received by the defendant as the attorney for the petitioner, and is still held by him. The amount of the plaintiff's charges as commissioner were included in the expenses and charges allowed by the court, but have not been paid to him; and he contends that, by the effect of the statute, one half of the amount was due to him

from the respondent, and, when collected on the execution by the defendant, was received by him to the plaintiff's use. But we think the statute was intended to apply only to parties interested in the partition, and not to affect other persons rendering services in relation to the partition, as officers, commissioners or otherwise. The statute was not intended to give a remedy to persons rendering such services, but a right of contribution to parties who had incurred expense in procuring them. *Potter v. Hazard*, 11 Allen, 187. The money was not due from the respondent to the plaintiff, and whether properly or improperly recovered by the defendant's principal, it was not money received to the plaintiff's use. *Exceptions overruled.*

ISRAEL LYMAN vs. ELLIOT I. LYMAN.

Franklin. Sept. 19. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

An agreement by a grantee, in consideration of the conveyance of land, to support the grantor during his life, is not a contract for the sale of land or any interest therein, within the statute of frauds.

If a grantee, in consideration of the conveyance of land, agrees to support the grantor during his life, and breaks the contract, the grantor may maintain an action to recover damages for the breach, and is not obliged to declare for the value of the land.

MORTON, C. J. The plaintiff conveyed his land to the defendant, in consideration whereof the defendant orally agreed that he would support the plaintiff and his wife during his life. After furnishing support to the plaintiff for some time, the defendant refused further to support him. This action is brought to recover damages for this breach of the defendant's agreement.

The Superior Court rightly ruled that the agreement of the defendant was not a contract for the sale of land, or any interest therein, within the statute of frauds. *Basford v. Pearson*, 9 Allen, 387. *Trowbridge v. Wetherbee*, 11 Allen, 361. *Nutting v. Dickinson*, 8 Allen, 540.

The defendant asked the court to rule that the action could not be maintained, because "it was for the recovery of general

damages, and not for the value of the land." The court rightly refused this ruling. The defendant having broken his contract, the plaintiff can maintain this action to recover damages for the breach, and is not obliged to declare for the value of the land. There is nothing in the bill of exceptions to show that the proper rule of damages was not given to the jury.

Exceptions overruled.

E. H. Lathrop, for the defendant.

C. C. Conant & S. D. Conant, for the plaintiff.

GREENFIELD SAVINGS BANK *vs.* HENRY R. SIMONS.

Franklin. Sept. 19. — Nov. 25, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

If the treasurer of a savings bank is instructed by a vote of the finance committee to sell certain rights to take stock in a corporation, the property of the bank, for not less than a sum named, and undertakes to do so, he acts as an agent of the bank, and not as a trustee, although he is also a trustee of the bank and a member of the finance committee; and if he immediately sells the rights to himself and other members of the committee for the price named, which is less than the market value of the rights, without making any attempt to procure purchasers at a higher rate, and pays to the bank the money so obtained, the bank may, without returning the money, maintain an action at law against him to recover the difference between the market value of the rights and the price obtained, but is not entitled to dividends paid on the stock represented by the rights.

The finance committee of a savings bank instructed, by vote, the treasurer of the bank to sell certain property of the bank at not less than a price named. The treasurer sold the property to himself and other members of the finance committee, for the price named, which was less than the market value of the property, and entered the amount on the cash-book of the bank. The vote was afterwards approved by the trustees. *Held*, that this approval was not a bar to an action by the bank against the treasurer to recover the difference between the market value of the property and the price paid, it not appearing that the attention of the trustees was called to the entry in the cash-book.

W. ALLEN, J. The defendant was authorized and instructed by the plaintiff bank to sell, for its benefit, its rights in the new stock in a national bank, and undertook the duty. In making the sale, he acted as the agent for the plaintiff to sell the specified property, and not as trustee. The facts that he was the

treasurer of the plaintiff, and that, as one of the trustees and a member of the finance committee, he took part in authorizing himself as treasurer to sell the rights, do not tend to show that, in making the sale, he acted as a trustee or a member of the committee, and not as agent.

In exercising his functions as agent, it was the duty of the defendant, and his promise was implied, to use reasonable fidelity, diligence and skill to sell to the best advantage of his principal. His authority was to sell for not less than a certain price, and his duty was to sell for as high a price as could be obtained by the exercise of reasonable diligence and skill. In executing this duty, he, immediately upon receiving authority, sold the rights to himself and other members of the committee which had authorized the sale, and who were all also directors in the national bank, at the minimum price authorized, without offering the stock to others, or making any attempt to find purchasers at a higher price. The report finds that the rights, sold for thirty dollars a right, had a cash value of forty-five dollars each, and would have realized that value in cash if properly exposed for sale. The court properly ruled that such acts, without proof of express fraud, were fraudulent in law, and that the plaintiff had a right to recover damages for the loss caused by them.

It appeared that the record of the doings of the finance committee authorizing the sale was read and approved at a meeting of the trustees, and that the amount received for the sale of the rights was entered on the plaintiff's cash-book by the defendant; and the defendant contends that the judge erred in not ruling, as matter of law, upon this evidence, that the plaintiff had affirmed and ratified the transaction. But we think that the refusal so to rule was clearly right. The vote was the authority under which the defendant acted, and it does not appear that the attention of the trustees was called to the entry upon the cash-book, or that any action was taken in regard to it.

The rule of damages laid down by the judge, that it was the difference between the sum for which the rights were sold and their cash value at the time of the sale, was correct. The plaintiff was not obliged to return the money, or to repurchase the rights, but may recover the actual damages occasioned to it by

the want of fidelity and diligence of the defendant. But this does not include dividends paid on the shares since the sale, and there was error in including them in the damages assessed. It appears upon the report that the plaintiff is entitled to recover \$1050, and interest thereon from the time of the sale, January 26, 1880. If it remits so much of the damages as exceeds that amount, the entry will be judgment affirmed; otherwise, verdict set aside, and a new trial ordered as to damages only.

Ordered accordingly.

A. L. Soule, (A. De Wolf with him,) for the defendant.

W. S. B. Hopkins & J. A. Aiken, for the plaintiff.



JOHN B. LEARNED vs. ADDISON G. HALL.

Hampshire. Sept. 19. — Oct. 19, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

No exception lies to the refusal of a judge to allow the counsel of one party to ask him why he did not use the deposition of a person which had been taken for use at the trial, but not offered in evidence; nor to the argument of the adverse party that the excepting party did not use the deposition because he dared not, as it would corroborate the adverse party, no objection having been taken to the argument at the time, or instruction asked relating thereto.

CONTRACT for a breach of warranty in the sale of a horse, with a count in tort for fraudulent representations. Trial in the Superior Court, before *Aldrich, J.*, who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show that the defendant purchased a horse, at the request of the plaintiff, of one Warner, of the State of New York. It was a material question whether at the time of the purchase the horse was vicious and unkind, and whether the defendant at the time he made such purchase knew he was vicious and unkind. The defendant testified that he had little knowledge as to the horse except the statements of Warner to him, which he gave in evidence, and which were to the effect that the horse had run away with his mate once from a ploughed field on a farm some eight months before Warner sold him, and

had never been hurt by it. At the conclusion of the evidence, the plaintiff being on the stand testifying in reply, the defendant's counsel asked him if he had not taken the deposition of Warner to be used in the trial, and then not introduced it in evidence; to which the plaintiff replied that he had. The plaintiff's counsel then asked him why he had not used the deposition; and the defendant objected. Thereupon the plaintiff's counsel offered to show by the plaintiff that he had not used the deposition because Warner had made different statements to him in conversation from the statements in the deposition, which statements to him induced him to take it; and claimed the right then to explain the fact that he did not use the deposition, as the defendant's counsel might argue that the deposition was not put in by the plaintiff because it would corroborate the defendant. The deposition was not offered or read in evidence. The judge refused to permit the question to be put. In argument, the defendant's counsel contended that the plaintiff did not use the deposition because he dared not, as it would corroborate the defendant; and the plaintiff's counsel contended that it was not used because Warner was in league with the defendant, they having confederated together since the case began.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

D. W. Bond & J. B. Bottum, for the plaintiff.

W. S. B. Hopkins, (*S. T. Field* with him,) for the defendant.

C. ALLEN, J. To meet the argument which might legitimately have been derived from the omission to read the deposition in evidence, the plaintiff did not offer to show that it was out of his power to introduce it, as, for example, that it had been lost, stolen, or destroyed. But the testimony which was offered would still have left the fact to be correctly inferred, it would indeed have furnished direct proof of the fact, that the plaintiff did not use the deposition because he thought it would not help his case.

It was a matter of no legal materiality how it happened that the plaintiff became disappointed in the testimony which he expected to obtain from the witness. If the deposition had been used by the adverse party, it would of course have been open to

the plaintiff to contradict the witness, by proving inconsistent statements made by him at other times. But the deposition was not used. The evidence of the witness was not in the case; and it was of no legal consequence whether he was a truthful person or not. It might well be that the plaintiff was disappointed at failing to obtain the evidence which he expected, and that he had been misled into taking the deposition; but the fact remained, that he did not produce the evidence of this particular witness in his favor, because the witness had testified in such a way as not to help him. This evidence being wanting, an inquiry into the truthfulness of the witness would be too remote from the question at issue. If the plaintiff could be allowed to introduce evidence of his untruthfulness, the defendant might introduce evidence in reply; and thus an issue would be raised and tried to the jury, as to the truthfulness or untruthfulness of a person in the country, whose testimony neither party cared to use. If the plaintiff could establish the fact that the person had testified falsely in a deposition which was not used, it would signify nothing.

We do not clearly perceive that the argument of the defendant's counsel to the jury was allowed to be pressed too far; but, if it was, the way to correct the effect of an argument which exceeds due limits is to object to it at the time, to answer it by a counter argument, or to ask suitable instructions to the jury.

Exceptions overruled.

WASHINGTON GRAVES vs. LUCIEN A. DAWSON.

Hampshire. Sept. 20. — Oct. 20, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

The discharge, without any action by the grand jury, of an accused person, who has been bound over upon a complaint to await such action, and the entry of a *nolle prosequi*, are such a termination of the proceedings against him as will sustain an action for a malicious prosecution.

In an action for a malicious prosecution, the plaintiff may recover damages for his imprisonment upon a warrant, although the action is brought after the time when by the statute of limitations an action for false imprisonment would be barred.

TORT for malicious prosecution. At the trial in the Superior Court, before *Bacon, J.*, the jury returned a verdict for the plaintiff, in the sum of \$750; and the judge reported the case for the determination of this court. The facts appear in the opinion.

C. Delano, for the defendant.

J. B. Bottum, for the plaintiff.

W. ALLEN, J. The facts show that, after the plaintiff had been bound over by the magistrate and before any action by the grand jury, he was, without his consent and against his remonstrance, discharged by the court on the motion of the district attorney; and that subsequently a *nolle prosequi* was entered by the district attorney. This was an abandonment of the prosecution and a termination of it in the plaintiff's favor. It has been decided in this Commonwealth that a *nolle prosequi* of an indictment is not necessarily such a termination of the prosecution as will maintain an action. *Bacon v. Towne*, 4 Cush. 217. *Parker v. Farley*, 10 Cush. 279. *Brown v. Lakeman*, 12 Cush. 482. It is not stated in either case that the party was discharged by the court, and in the leading case it appears that the *nolle prosequi* was by the agreement and consent of the defendant. Whether such an entry by the district attorney after indictment found, with the discharge of the defendant by the court without his consent, would be such a termination of the prosecution as to permit him to show want of probable cause in the prosecution, it is not necessary to consider. See cases cited above, and *Cardinal v. Smith*, 109 Mass. 158, and cases cited; *Knott v. Sargent*, 125 Mass. 95; *Graves v. Dawson*, 130 Mass. 78.

In the case at bar, there was an abandonment and termination of the prosecution by the complainant and the district attorney, and a discharge of the plaintiff by the court, before indictment found, and the case was never before the grand jury. Had the plaintiff been discharged by the magistrate, or had the grand jury found "no bill," no question could have been made. The prosecution in this case was as effectually determined as it would have been in either of the cases supposed, and terminated in favor of the plaintiff, though not so as to bar another prosecution. The plaintiff is not in fault that the prosecution cannot be terminated by a judgment upon a verdict; and to hold that he is

thereby debarred from proving his express allegation that the prosecution was without probable cause, would be to give to the finding of the magistrate on the preliminary examination the conclusive effect of a verdict of guilty by a jury. See *Coupal v. Ward*, 106 Mass. 289; *Basébé v. Matthews*, L. R. 2 C. P. 684; *Brook v. Carpenter*, 3 Bing. 303; *Watkins v. Lee*, 5 M. & W. 270; *Fay v. O'Neill*, 36 N. Y. 11; *Clark v. Cleveland*, 6 Hill, 344; *Brown v. Randall*, 36 Conn. 56; *Driggs v. Burton*, 44 Vt. 124, 143.

The defendant contended that, so far as the plaintiff's claim was for his imprisonment after his arrest, it was barred by the Gen. Sts. c. 155, § 2, because not brought within two years. But this is not an action for false imprisonment, and the rule of damages is not affected by the statute of limitations relating to that action.

Judgment on the verdict.



GEORGIE A. BUCKLAND, administratrix, vs. N. W. GREEN.

Hampden. Sept. 26. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

If an administrator sells, under the Gen. Sts. c. 98, § 4, to A. a claim due to the estate of his intestate from B., and then brings an action against B., in his own name, as administrator, for the benefit of A., it is within the discretion of the Superior Court to allow the writ to be amended by striking out the name of the administrator, and inserting that of A. as plaintiff.

CONTRACT by "Georgie A. Buckland, administratrix of the estate of J. P. Buckland, late of Holyoke in said county, deceased," on an account annexed, for services alleged to have been rendered by the plaintiff's intestate. The writ was dated March 30, 1881, and alleged that "this action is brought for the benefit of William G. White, of Chicopee, in said county, the equitable owner of said claim." The answer denied each and every material allegation in the plaintiff's declaration, alleged payment, and contained the following: "And the defendant for further answer says, that, prior to the commencement of this action, the plaintiff, as administratrix of said estate, under license

granted by the Probate Court in and for the county of Hampden, duly sold or assigned the demand or claim against the defendant on which this suit is founded."

In the Superior Court, the plaintiff offered the following amendment: "And now comes the plaintiff, and moves to amend the writ in said action by striking out the words 'Georgie A. Buckland, administratrix of the estate of J. P. Buckland, late of Holyoke, in said county, deceased.' This action is brought for the benefit of William G. White, of Chicopee, the equitable owner of said claim,' and inserting the following: 'William G. White, of Chicopee, in said county, the claim for which this action is brought having been sold and assigned by Georgie A. Buckland, administratrix of the estate of J. P. Buckland, by authority and license of the Probate Court, on the 19th day of March, 1881, and purchased by said William G. White.'"

Putnam, J. allowed this amendment, against the objection of the defendant.

It was agreed that said claim was duly sold, as alleged, prior to the commencement of this action; and that all the formalities required by the Gen. Sts. c. 98, § 4, had been complied with. At the hearing, without a jury, the judge found for the plaintiff; and the defendant alleged exceptions.

E. P. Kendrick, for the defendant.

W. G. White, for the plaintiff.

BY THE COURT. The allowance of the amendment was within the discretion of the Superior Court. *Winch v. Hosmer*, 122 Mass. 438.

Exceptions overruled.

WILLIAM G. WHITE, administrator, *vs.* CHARLES H. ALLEN.

Hampden. Sept. 26. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

A. delivered a quantity of hides to B. to be by him tanned, curried and sold; and, out of the proceeds derived from the sale, B. was to pay A. a certain sum, at which the hides were charged to B., and to retain the balance of the proceeds of the sale for his labor on the hides and for his services in selling the same. Until thus tanned, curried and paid for, the title to the hides was to remain in A. B. died before the process of tanning and currying was completed, and A. immediately took possession of the hides and completed this process and sold them for a sum stated, which was their value at the time A. took possession of and sold them. *Held*, in an action by B.'s administrator against A., that the contract between A. and B. was not so personal in its character that it was determined by the death of B.; and that the administrator was entitled to recover only the difference between the amount at which the hides were charged to B. and the amount realized from the sale by A.

TORT for the conversion of fifty hides of leather, with a count in contract for money had and received. The case was submitted to the Superior Court upon agreed facts, in substance as follows:

Charles Byrt died intestate on March 25, 1881, and the plaintiff was appointed administrator of his estate on October 4, 1881. The defendant is the surviving partner of the firm of T. H. Allen & Brother.

The plaintiff's intestate was a tanner and currier, and, in February 1881, the defendant's firm sent to him fifty hides to be by him tanned, curried and sold, and, out of the proceeds derived from the sale of the hides he was to pay the firm the sum at which they were charged to him, namely, \$117.61, and to retain the balance of the proceeds of such sale for his labor and for selling the same. It was stipulated that, until thus tanned, curried and paid for, the title to the hides should remain in the firm. The process of tanning and currying was not quite completed when the plaintiff's intestate died, and, within two days after his death, the defendant's firm took possession of the hides and finished and completed this process. Five days after his death they sold the hides for \$132.81; and this was their value when the firm took possession of and sold them. In order to prevent damage to the hides, it was necessary to complete this

process of tanning and currying without delay. The authority of the plaintiff's intestate to tan, curry and sell these hides was never revoked during his life by the defendant's firm, and he was never paid for performing this service.

If, upon the above facts, the plaintiff could recover, judgment was to be entered for him for such sum as he was entitled to recover; otherwise, judgment for the defendant.

Bacon, J. found that the plaintiff was entitled to recover, \$182.81, and ordered judgment for him for that amount; and the defendant appealed to this court.

W. G. White, pro se.

F. E. Carpenter, for the defendant.

DEVENS, J. The contract between the plaintiff's intestate and the defendant's firm is not to be deemed one so personal in its character that it was determined by the death of the intestate. It could have been completed by the administrator, by finishing the tanning and currying and selling the skins, belonging to the firm, upon the terms agreed. The work having been in fact completed by the firm and the skins sold, the question is as to the damages that the plaintiff may recover. Where one has a special property in a chattel, or a lien thereon, he may in some instances recover its full value against a wrongdoer who appropriates it; but as in such case he recovers all that exceeds his own special property or interest therein, for the benefit of the general owner, when the wrongdoer is not a third person, but the general owner himself, his rights are fully maintained, and circuity of action is avoided, by permitting him to recover the value or amount of his special property or interest alone. He is thus fully indemnified, the balance of the value is with those entitled to it, and the whole controversy is thus settled in a single suit. *Chamberlin v. Shaw*, 18 Pick. 278. *Fowler v. Gilman*, 13 Met. 267. *King v. Bangs*, 120 Mass. 514. *Burdick v. Murray*, 3 Vt. 302. *Spoor v. Holland*, 8 Wend. 445.

The plaintiff seeks to distinguish the present from the cases above cited, upon the ground, first, that the plaintiff's intestate never would have had any right of action for tanning or currying the hides, as he was to be paid, if paid at all, only by the balance of the proceeds of any sale above \$117.61; and second, that the plaintiff's intestate never held the hides as security for

any charges which the defendant could pay or tender, and thus recover possession of the same. But the amount due the plaintiff is readily ascertainable. It could not exceed the difference between \$117.61 and the value of the skins when the process was completed, for which they were in the hands of the intestate, and there is no reason why it should not equal that, as it is found that, alike when the skins were taken by the defendant and when they were sold, they were of the value of \$132.81, although something had been done upon them by the defendant to complete them.

It is urged that the value of the interest of the plaintiff not only fluctuates with the price of the goods, but depends upon that fact entirely; and that, having been entitled to sell the goods himself, and having been deprived of that right, the damages sustained cannot be thus measured. But in every case where goods are wrongfully taken, the owner is deprived of his right to sell them, which might perhaps have enabled him to obtain a higher price than their value when taken, by a favorable change in the market; yet it is deemed that he is sufficiently compensated by receiving their then actual value. If, therefore, the plaintiff were allowed to recover the whole sum of \$132.81, there would be nothing which he could offset as damages in an action brought by the defendant for the sum of \$117.61.

The case does not seem to us distinguishable in principle from those before cited; and the sum of \$15.20, being the difference between the two sums above named, with interest upon it from the date of the writ, is all that the plaintiff is entitled to recover.

Judgment accordingly.

DELLA STONE *vs.* PATRICK LAHEY.

Hampden. Sept. 26. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

If a tenant at will surrenders the premises by an express agreement with the owner, and vacates them with his family and goods, leaving behind a person who has occupied the premises with him by his permission, but without the owner's knowledge or consent, the owner is not liable to an action for an assault, if he ejects such person, after request and refusal to leave the premises, using no unreasonable force.

TORT for assault and battery. Trial in the Superior Court, without a jury, before *Bacon, J.*, who allowed a bill of exceptions, in substance as follows :

The plaintiff was in the occupation of a tenement belonging to the defendant, which the plaintiff's husband occupied under the plaintiff's brother, who rented it from the defendant, and who had, up to a short time before the alleged assault, occupied it himself, together with the plaintiff and her family. Several days before the alleged assault, the plaintiff's brother, by an express agreement with the defendant, surrendered the tenement to him, and vacated it with his family and goods, leaving the plaintiff there.

The defendant had never known of or consented to the plaintiff's occupation, and, on the day of the alleged assault, went to the house expecting to find it empty, but found the plaintiff there. He requested her to leave at once, and, on her refusing to comply, put some of her furniture out of doors, took hold of her and attempted to eject her, using no unnecessary or unreasonable force.

The plaintiff requested the judge to rule that, upon these facts, she was entitled to reasonable notice before forcible ouster; and that this notice was not given. The judge refused so to rule; ruled that, the plaintiff's occupation being under her brother, who had surrendered to the defendant and left, and had thereby surrendered his rights, if the defendant went to the tenement under the circumstances above set forth, supposing it was vacant, and found the plaintiff there, he was justified in ejecting her, using no unreasonable force; and ordered judgment for the defendant. The plaintiff alleged exceptions.

H. C. Bliss, for the plaintiff.

R. W. Ellis, for the defendant, was not called upon.

DEVENS, J. The plaintiff's brother had rented the premises of the defendant, and had surrendered them to him by express agreement, vacating them with his family and goods. The plaintiff, who had occupied by leave of her brother, was left behind when he abandoned the premises. She was thus occupying without right or authority. Whether to be deemed a trespasser or not, before demand was made that she should leave, she certainly became one when such demand was made and she refused compliance. She was entitled to no other notice to quit than one that should inform her that the person by whose authority she was originally there had surrendered possession, and that the defendant desired her to leave. Upon her refusal to comply with this request, he was justified in ejecting her, using no unreasonable force. Such was the ruling of the presiding justice, and it is fully supported by *Low v. Elwell*, 121 Mass. 309.

Exceptions overruled.

IRA G. POTTER, executor, vs. JOSEPH W. BALDWIN.

Hampden. Sept. 26. — Oct. 2, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

On the issue whether the execution of a will was procured by the undue influence of a third person, evidence was admitted, for the purpose of showing the state of the testator's feelings towards such third person, of conversations between the testator and his only son and son's wife, at different times during the eight years preceding the date of the will, in which the testator said that he was so under the influence of the third person that he could not resist her when he was in her presence. Evidence was further admitted, for the same purpose, and to show his state of mind towards his son, of a conversation between the testator and another person, on the night before he died, in which he said that he wished to see his son, and that he did not know but he had been deceived. *Held*, that the evidence was competent for the purpose for which it was admitted.

If no instructions are asked as to the use and effect of evidence admitted under objection at the trial, it is not open to the objecting party to contend in this court that the evidence was not limited by the judge in his instructions to the only purpose for which it was competent.

APPEAL from a decree of the Probate Court, allowing the will of John Baldwin, by his only son and heir at law. Hearing in this court, before *W. Allen, J.*, who allowed a bill of exceptions, in substance as follows:

No question was made as to the formal execution of the will, and the only issue submitted to the jury was whether the will was obtained by the undue influence of Mrs. Francelia S. Lane. The will was dated January 30, 1880, and by it the testator devised and bequeathed his entire estate to said Lane. The testator died on February 17, 1880.

The judge admitted, against the appellee's objection, for the purpose of showing the state of feeling of the testator towards Lane, evidence of conversations between the testator and his son and son's wife, in 1872, in which it was testified that the testator said he was so under the influence of Lane that he could not resist her when he was in her presence. This was but a small portion of the conversations admitted, all of which was of the same character, and was admitted upon the statement of the appellant's counsel that they expected to show similar expressions of feeling from time to time up to the date of the will; and such expressions were testified to.

The judge also admitted, against the appellee's objection, for the same purpose, and to show his state of mind towards his son, evidence of a conversation between the testator and one Edward O'Neil, on the night of February 16, to the effect that the testator said he wished to see his son Joseph, and that he did not know but he had been deceived. These conversations were used by the counsel for the appellant in his argument to the jury as showing undue influence and deception by Lane. No instructions were given to the jury, or asked, as to the use or effect of the foregoing evidence.

The jury found that the will was obtained by the undue influence of Lane; and the appellee alleged exceptions.

D. W. Bond, for the appellee.

G. Wells, (*N. A. Leonard* with him,) for the appellant.

DEVENS, J. The evidence of conversations between the testator and his son and son's wife in 1872, wherein he said that he was so under the influence of Francelia S. Lane that he could not resist her when he was in her presence, in connection with

similar expressions of feeling up to the date of the will, was properly admitted for the purpose of showing the state of the testator's feeling towards her. *Shailer v. Bumstead*, 99 Mass. 112. *Lewis v. Mason*, 109 Mass. 169. They strongly resemble those received in *May v. Bradlee*, 127 Mass. 414, where the question was whether a testator was induced by undue influence to revoke a will, to the effect that a certain person (through whose influence it was contended that the will was revoked) told him to erase his name, and that he felt that he had to do as this person said.

Upon similar grounds, the evidence of a conversation the night before he died, in which he stated that he wished "to see his son Joseph, and that he did not know but that he had been deceived," was admissible to show his state of feeling towards his son and Francelia S. Lane. The wish to see his son might well be considered as showing a kindly feeling toward him. *Lewis v. Mason*, *ubi supra*. While the declaration did not state by whom he felt that he might have been deceived, yet, when taken in connection with the evidence appearing in the case in regard to Mrs. Lane, it might have been found by the jury to refer to her and to exhibit his then state of feeling towards her.

In proving the existence of that undue influence over a testator, by which his will may be avoided, two things are necessarily to be shown, the extraneous words, acts or circumstances by which it has been exerted, and the effect thereby produced upon the mind of the testator, the former of which cannot, the latter of which may, be shown by his declarations. The difference is certainly obvious between receiving the declarations of a testator to prove an external fact, such as duress, fraud or importunate solicitation, and as evidence merely of his mental condition. In the one case, it is hearsay evidence, and open to all the objections applicable to that species of evidence, while in the other it is appropriate, and directly bears upon the issue to be tried. *Waterman v. Whitney*, 1 Kernan, 157, 165.

For the purpose for which it was admitted, the evidence was therefore competent. It is not to be inferred that it was applied by the jury to any other purpose. If these conversations were used at the trial by the counsel for the appellant in his argument for the purpose of showing undue influence and deception by

Francelia S. Lane, such use was certainly improper. But the counsel for the appellee asked no instructions as to the use and effect of this evidence, nor did he, so far as the bill of exceptions shows, call the attention of the presiding judge to the matter. He cannot now object that it was not limited by the presiding judge in his instructions to the only purpose for which it was competent. If evidence be admissible for any purpose, its admission cannot be made a ground of exception, unless it be shown that the judge refused to limit it to that purpose, and permitted it to be used for a purpose for which it was not competent, against the objection of the excepting party. *Howe v. Ray*, 113 Mass. 88. *Packer v. Lockman*, 115 Mass. 72. As the evidence had been admitted for a purpose we deem to have been competent, and as no instruction was requested or given limiting its effect to that purpose, we cannot infer otherwise than that both the counsel for the appellee and presiding judge deemed that the purpose of its admission had been stated with sufficient clearness at the time it was received, and that, notwithstanding the argument of the counsel for the appellant, there was no danger that the jury would be misled in its application. Had the counsel for the appellee thought differently, he certainly should have called the attention of the presiding judge to the matter. Not having done so, he has now no just ground of complaint.

Exceptions overruled.

FRANK OCTO vs. MICHAEL J. TEAHAN.

Hampden. Sept. 26. — Oct. 23, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

The exclusive original jurisdiction of all actions of replevin where the value of the property alleged to be detained does not exceed one hundred dollars, conferred upon trial justices by the St. of 1877, c. 211, § 8, extends, by force of the Gen. Sta. c. 116, §§ 10, 18, to district and police courts; and an action of replevin where the value of the property replevied does not exceed one hundred dollars cannot be brought originally in the Superior Court.

REPLEVIN of certain personal property. The writ, dated March 5, 1881, and returnable to the Superior Court, alleged the goods to be of the value of \$100.

At the trial, it appeared that the value of the property when replevied was \$28.65; and thereupon, on motion of the defendant, *Putnam*, J. dismissed the action for want of jurisdiction. Judgment was entered for the defendant; and the plaintiff appealed to this court.

H. K. Hawes, for the plaintiff.

R. O. Dwight & P. H. Casey, for the defendant.

MORTON, C. J. In this Commonwealth, an action of replevin for goods cannot be maintained unless the value of the goods exceeds twenty dollars. Gen. Sts. c. 148, § 10. Pub. Sts. c. 184, § 10. *King v. Dewey*, 11 Cush. 218.

By the General Statutes, the Superior Court had original jurisdiction of all actions of replevin where the value of the goods replevied exceeded twenty dollars; and police courts and justices of the peace had concurrent jurisdiction where the value of the goods did not exceed one hundred dollars. Gen. Sts. c. 114, §§ 3, 4; c. 116, §§ 10, 18; c. 120, § 2.

In 1871, it was provided that the police and municipal courts should have jurisdiction concurrently with the Superior Court of all personal actions and proceedings in civil cases in which the amount demanded, or the value of the property claimed, did not exceed three hundred dollars. St. 1871, c. 144.

In 1877, the Legislature enacted that police and district courts should have original and concurrent jurisdiction with the Superior Court of all actions of contract, tort or replevin where the debt or damages demanded, or the value of the property alleged to be detained, was more than twenty and did not exceed three hundred dollars. St. 1877, c. 210.

Under these statutes, if they have not been repealed or controlled by other provisions, it is clear that the Superior Court would have original jurisdiction in all actions of replevin where the value of the goods replevied is more than twenty dollars; that police and district courts have concurrent jurisdiction, within their territorial limits, where the value of the goods does not exceed three hundred dollars; and that trial justices have concurrent jurisdiction where the value of the goods does not exceed one hundred dollars.

But by another statute of 1877, approved and to take effect on the same day with chapter 210 and embodied in chapter 211,

the Legislature enacted that trial justices shall have exclusive original jurisdiction of all actions of contract, tort or replevin, where the debt or damages demanded, or value of the property alleged to be detained, does not exceed one hundred dollars, and original and concurrent jurisdiction with the Superior Court of actions of contract, tort or replevin where the debt or damages demanded, or the value of the property alleged to be detained, is more than one hundred and does not exceed three hundred dollars. St. 1877, c. 211, § 3.

Whether this statute, though passed on the same day, is to be regarded as a subsequent statute, and as the latest expression of the will of the Legislature, or the two statutes are to be regarded as passed at the same time, we need not decide. In either view, they must be construed in connection with existing statutes and the general policy of the Commonwealth upon the subject. The general laws, not repealed or modified, which define the powers of district and police courts, provide that they shall have the same powers and jurisdiction as justices of the peace or trial justices. Gen. Sts. c. 116, §§ 10, 18. Pub. Sts. c. 154, § 11. Whenever the Legislature confers additional powers or jurisdiction upon justices of the peace or trial justices, it by the same act confers the same powers upon district and police courts, unless they are excluded by express provision or clear implication. When, therefore, the Legislature of 1877 conferred upon trial justices exclusive jurisdiction in actions of replevin where the value of the property replevied does not exceed one hundred dollars, it conferred the same exclusive jurisdiction upon district and police courts. There is nothing in the statutes to indicate a different intention.

The purpose of the statutes was to enlarge the jurisdiction of the inferior courts, not to impair it. The whole history of legislation upon the subject shows that police and district courts are regarded as of a somewhat higher grade than justices of the peace, and it is highly improbable that the Legislature should intend to confer upon the inferior tribunal a higher and more dignified jurisdiction than that possessed by the superior tribunal. It may be added, that the commissioners and the Legislature adopted the same construction of these statutes in the last revision. Pub. Sts. c. 154, § 11; c. 155, § 12.

It follows that, at the time this suit was brought, the Superior Court had not original jurisdiction of actions of replevin where the value of the goods replevied did not exceed one hundred dollars; and, as it appeared at the trial that the goods replevied were of less value than one hundred dollars, the presiding justice rightly dismissed the action. *Leonard v. Hannon*, 105 Mass. 118. *Blake v. Darling*, 116 Mass. 800.

Judgment affirmed.

DANIEL HULL & another vs. INHABITANTS OF WESTFIELD.

Hampden. Sept. 26. — Oct. 23, 1882. ENDICOTT, LORD & FIELD, JJ.,
absent.

Where a statute authorizes a work for public use, and the work is executed in a reasonably proper and skilful manner, any damage necessarily caused to any person by taking his property can be recovered only in the manner pointed out by the statute.

If the Legislature gives a town authority to construct a dike, to dig a channel in a river, to cut down and remove any trees or brush, and to remove and carry away any logs, stones or earth which hinder the passage of the water, and the town by vote appoints a committee to do the work, and authorizes it to cause all trees and brushwood to be cut down and removed, and all the logs, drift wood and other obstructions to be removed and carried away, and to remove the material excavated to or beyond the dike, the committee may cause the logs to be burned, if that is the most convenient and prudent way of disposing of them, and may use the material excavated in the construction of the dike.

TORT for the conversion of certain gravel, wood and logs. Trial in the Superior Court, without a jury, before *Putnam, J.*, who ruled that the action could not be maintained; found for the defendant; and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered for the defendant; otherwise, a new trial to be ordered. The facts appear in the opinion.

H. W. Ely, for the plaintiffs.

M. B. Whitney, (*J. R. Dunbar* with him,) for the defendant.

MORTON, C. J. The St. of 1879, c. 150, authorized the town of Westfield to locate and construct a dike for the purpose of protecting the highways from damage in times of freshets, and

to enter upon lands and to take the soil and other materials needed to construct and maintain the dike. It also authorized the town to dig a channel on Town Island, so called, and to cut down and remove any trees or brush, and to remove and carry away any logs, stones, earth or other material on Town Island which hindered the free passage of the water. It further provided that any damages sustained by any party by acts done under the provisions of the act should be ascertained and determined by the town, and gave to any party aggrieved the right to apply for a jury to revise such determination.

The town proceeded under the act to build a dike and to dig a channel. In digging the channel, the committee appointed by the town removed the gravel on land of the plaintiffs within the limit staked out for the channel, and used it in the construction of the dike, and cut some wood and removed and carried away some logs and stumps, within and near the channel, belonging to the plaintiffs, which in the judgment of the committee impeded the free passage of the water. Some of the logs or stumps were burned. The plaintiffs bring this action of tort to recover for such gravel, wood, logs and stumps. The judge, before whom the case was tried without a jury, found that all the acts complained of were done under the authority of the act of the Legislature, and that the provisions of the act were complied with.

Upon these facts, it is clear that this action cannot be maintained. The case falls within the well-established rule, that where the Legislature authorizes a work for public use, and the work thus authorized is executed in a reasonably proper and skilful manner, any damage necessarily caused to any person by taking his property can be recovered only in the manner pointed out by the statute. The acts complained of in this case were done under the authority of the public, in the exercise of the right of eminent domain; they were legal and right, and the plaintiffs' exclusive remedy is by an application for a jury under the statute. *Perry v. Worcester*, 6 Gray, 544.

The plaintiffs contend that they were not bound to pursue the remedy provided by the act, because some of the acts of the committee exceeded the authority conferred on them by the votes of the town. These acts were the burning of some of the

logs and stumps, and the using of the gravel excavated from the channel in the construction of the dike. The committee had the right to do these acts under the vote upon article third of the warrant. The vote to cause all trees and brushwood to be cut down and removed, and all the logs, driftwood and other obstructions to be removed and carried away, authorized the committee to burn the stumps and logs if that was the most convenient and prudent way of removing and disposing of them. The vote "that the material excavated be removed to or beyond the dike" necessarily imports that it might be used in the construction of the dike.

Judgment for the defendant.

THOMAS L. NELSON vs. GEORGE C. WINCHESTER.

Worcester. Oct. 5. — 16, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

Under the Gen. Sts. c. 118, § 45, providing that the judge, before whom proceedings in insolvency are pending, may order the lien created by an attachment of the property of an insolvent debtor to continue, upon application made by any person interested "on or before the day of the third meeting of creditors," taken in connection with the provision of § 75, that the third meeting of the creditors is "to be held within six months from the time of the appointment of the assignee," the application must be made on or before the day provided by law for the holding of the third meeting, and cannot be made at an adjournment of that meeting.

CONTRACT upon an account annexed. Trial in the Superior Court, without a jury, before *Knowlton*, J., who reported the case for the determination of this court, in substance as follows:

The action was commenced on August 13, 1879, and an attachment of real estate made upon the original writ. In September, 1879, the defendant was adjudged by the Court of Insolvency an insolvent debtor upon involuntary proceedings. On March 21, 1881, an order was issued for the third meeting of the creditors of the defendant, returnable April 26, 1881, on which day the meeting was held. That meeting, by three successive adjournments, was adjourned to September 27, 1881, on which day the

assignees of the defendant made application to the Court of Insolvency to order the lien created by the attachment to continue as provided by the Gen. Sts. c. 118, § 45; which application was granted, and the assignees were subsequently admitted as parties in the Superior Court to prosecute the action.

Upon these facts, the judge ruled that the action could not be maintained under the provisions of said section; and found for the defendant.

If the ruling was correct, judgment was to be entered thereon for the defendant against said assignees; otherwise, judgment was to be entered in their favor for the full amount claimed in the writ; or such other order to be made as law and justice might require.

S. Hoar, for the assignees.

F. A. Gaskill, for the defendant.

MORTON, C. J. The statute provides that, "if a debtor, whose property is attached, conveys before judgment and execution in the suit any part of such property, and, subsequently thereto and before execution issues, proceedings are commenced by or against him as an insolvent debtor, or if a dissolution of an attachment under the preceding section might prevent the property attached from passing to the assignee, the judge before whom proceedings in insolvency are pending, or the court to which the process of attachment is returnable, may upon application made on or before the day of the third meeting of creditors by any person interested, and cause shown thereon, order the lien created by the attachment to continue. The action may be continued or execution stayed until the assignee is chosen and takes charge of the action. The assignee may proceed with the action and levy the execution at the cost and expense of the estate; and the amount recovered exclusive of costs due to the original plaintiff shall vest in the assignee." Gen. Sts. c. 118, § 45. Pub. Sts. c. 157, § 47.

It is clear that, under this and the next preceding section, an attachment of the property of an insolvent debtor is dissolved, and an assignee has no right to intervene in the suit and prosecute it to judgment for the purpose of securing the attached property to the estate, unless he or some person interested, "on or before the day of the third meeting of creditors," makes

application for, and obtains, an order continuing the lien created by the attachment.

In the case before us, the third meeting of creditors was called for, and held on, April 26, 1881. It was continued by successive adjournments until September 27, 1881, on which day the assignees made application for an order continuing the lien created by the attachment. We are of opinion that this application was too late, and that the judge of insolvency had no authority to order the lien to be continued. The attachment was already dissolved by the failure to make application within the time limited by the statute.

The St. of 1838, *c.* 163, § 5, provided that the assignment should dissolve attachments of the debtor's property, but made no provision for continuing the liens for the benefit of the estate. The object was that the attached property should come to the estate to be distributed among all the creditors; but it was found, practically, that, in many cases, the effect of dissolving attachments was that the attached property went to the benefit of subsequent purchasers, or creditors having liens subsequent to the attachment, thus defeating the object of the statute. To remedy this evil, it was provided by the St. of 1841, *c.* 124, § 5, that, if it appeared to the judge of probate or master in chancery, before whom insolvency proceedings were pending, that the dissolution of any attachment would prevent the attached property from passing to the assignees, the attachment upon his order should survive, and the assignees might proceed with the suit, and the amount recovered should vest in them. This statute and the amendment thereof by the St. of 1855, *c.* 66, contain no limitation of time within which the order continuing the attachment might be made. The result was, that, in many cases where the attached property was claimed under a subsequent purchase or lien, the title to the property was uncertain and unsettled for an indefinite period of time.

To obviate this difficulty, the St. of 1857, *c.* 247, was passed, by which it was enacted that the attachment shall be held to be dissolved by the assignment, unless the order continuing it "shall be obtained or applied for, by some person interested, on or before the day of holding the third meeting of the creditors." The General Statutes, which govern this case, use the language,

"on or before the day of the third meeting of creditors," but it is clear that the intention of the Legislature was to reenact and not to alter the sense of the St. of 1857.

These provisions are in the nature of a statute of limitations. The object of the Legislature was to fix a reasonable time within which the assignees or other persons interested should apply for an order to continue the attachment for the benefit of the estate. It is most natural that in this, as in other statutes of limitation, it should fix a definite and certain, and not a fluctuating and uncertain period of limitation. The statute provides that the third meeting is "to be held within six months from the time of the appointment of the assignee." Gen. Sts. c. 118, § 75. Taken in connection with this, the provision that an application for an order to continue an attachment shall be made "on or before the day of holding the third meeting," or "on or before the day of the third meeting," seems to us to mean that the application must be made on or before the day provided by law for the holding of the third meeting. The third meeting may be adjourned for months or for years. The several adjournments constitute but one meeting, and, as a general rule, anything required to be done at the third meeting may be done at any adjournment thereof. *Rice v. Wallace*, 7 Met. 431.

If the statute were that the application for an order to continue the attachment may be made at or before the third meeting, there would be strong grounds for holding that it might be made at any adjournment of the third meeting. But the statute does not so provide. The words, "on or before the day of the third meeting," or "on or before the day of holding the third meeting," do not require the same construction as if the words used were "at the third meeting." On the contrary, they import, by their fair construction, that the Legislature intended to limit the time within which such application must be made, by fixing a definite day, namely, the day when by law the third meeting is to be held, as the last day of the period of limitation.

We are of opinion that the ruling of the Superior Court was correct.

Judgment for the defendant.

JULIUS M. LYON vs. JEROME F. MANNING.

Worcester. Oct. 6. — 16, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

In an action upon a promissory note, if the answer sets up a release under seal, and the release is put in evidence, the plaintiff may show that the release was obtained by fraud, although no replication is filed by him.

A party cannot put in evidence a letter containing declarations of a stranger to the action, not under oath, and not shown to be connected with the adverse party in any such way as to make his statements admissible.

MORTON, C. J. This is an action upon a promissory note signed by the defendant, payable to and indorsed by Charlotte A. Holman. The answer set up a written release under seal, executed by the said Holman, and that the plaintiff was not the *bona fide* holder of the note for value. No replication was filed by the plaintiff.

On the trial, before the court without a jury, the presiding justice found that the plaintiff was not such a *bona fide* holder for value as to prevent the defendant from availing himself of such defences as existed between him and said Holman, and permitted him to put in the release relied on in his answer. The plaintiff then offered evidence showing that the release was obtained by fraud. The defendant objected to this evidence, under the pleadings, but it was admitted; and the court found that said release was obtained by the defendant by fraud, and was void.

We are of opinion that the evidence was rightly admitted. The practice act provides that "no further pleading shall be required after the answer, except by order of the court as hereinafter mentioned. But the plaintiff may demur to the answer; and, if the answer contains any new matter in avoidance of the action, such new matter shall be deemed to be denied by the plaintiff; or the court may on motion of the defendant require the plaintiff to reply thereto, and to state whether he admits or denies any, and, if any, what part thereof. The plaintiff may without such order file, at any time before trial, a replication to the answer, clearly and specifically stating any facts in reply to the new matter therein." Pub. Sts. c. 167, § 24.

The defendant contends that the meaning of this provision is, that, if the answer sets up any new matter in avoidance of the action, and the plaintiff does not file a replication, he is to be deemed merely to deny the new matter to the same effect as if he had replied traversing it; and that he cannot avail himself of any facts by way of discharge or avoidance of the new matter, unless he files a replication. The natural construction of the language and the history of the legislation upon the subject show that this is not the intention of the statute.

The original practice act of 1851 contained express provisions as to the conduct of the pleadings after the answer. It provided that, if the answer set up any new matter in avoidance of the action, the plaintiff should within twenty days file a replication, either denying the new matter or alleging any substantive facts by way of avoidance of it; otherwise a nonsuit should be entered. St. 1851, c. 233, § 28. In the following year, these provisions were repealed, and, in place of them, provisions were adopted in substantially the same form as those above quoted. St. 1852, c. 312, § 19. It is clear that the Legislature intended to change, not to reenact, the provisions of the St. of 1851. The provision that "no further pleading shall be required after the answer, except by order of the court," is general; and covers pleadings setting up facts by way of avoidance of any new matter in the answer, as well as those traversing it. The Legislature undoubtedly considered that the rights of defendants would be sufficiently protected by giving the court authority to order a replication to be filed whenever justice required it.

The provisions of the St. of 1852 have been retained in the General Statutes and in the Public Statutes without any change in the legal effect. Gen. Sts. c. 129, § 23. Pub. Sts. c. 167, § 24. And we are of opinion that, under the pleadings in the case before us, it was competent for the plaintiff to show that the release set up in the defendant's answer was obtained by fraud.

The defendant offered in evidence a letter of one Richardson, which was rejected by the court. We can see no ground upon which it was admissible. The declarations contained in it were declarations of a stranger to the suit, not under oath, and not

shown to be connected with the plaintiff, real or nominal, in any such way as to make his statement admissible.

Exceptions overruled.

W. A. Gile, for the defendant.

G. M. Woodward & F. A. Gaskill, for the plaintiff, were not called upon.



HENRY C. FISH & another vs. GEORGE W. GATES.

Worcester. Oct. 6. — 16, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

If two persons, as copartners, make a special contract to do work for another, they must join as plaintiffs in an action for the money due thereunder, although the partnership is dissolved before the work is completed; and if the contract has been fully performed on their part, and nothing remains but a mere duty of the defendant to pay money, a count on an account annexed will lie.

CONTRACT by Henry C. Fish and Charles W. Stone, "formerly copartners as Henry C. Fish & Company," in three counts for work and labor. The first two counts were upon an account annexed, and the third count was upon a special contract. Writ dated May 31, 1881. Trial in the Superior Court, before *Knowlton, J.*, who allowed a bill of exceptions, in substance as follows:

It was in evidence that the defendant made a special contract with the plaintiffs, who were then copartners, by which they were to do certain specified work, at a certain fixed price per set, upon fifty sets of table irons, which the defendant owned and was to deliver at their shop and take away again when the work was finished; and that the defendant delivered said irons at the plaintiffs' shop and took away and used twenty-five of them. The plaintiffs introduced evidence tending to show that said contract was fully performed; and the defendant introduced evidence tending to show the contrary.

The firm, consisting of the plaintiffs, was dissolved, by mutual consent, on April 14, 1881. The plaintiff Fish assumed all the claims and liabilities, and all responsibility for the unfinished business of the copartnership, and continued the business. But

very little of the work sued for had been done, and none of the sets of irons were completed, when the plaintiffs dissolved partnership; and the sets of irons were all completed and the work performed by a person in the employ of the firm until its dissolution, and afterwards in the employ and under the supervision of the plaintiff Fish alone.

Upon this evidence, the defendant asked the judge to rule that, if the partnership was dissolved on April 14, 1881, and none of this work was completed at that time, the plaintiffs could not recover on the first two counts in the declaration. But the judge declined so to rule.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

C. F. Stevens, for the defendant.

F. E. Barker, for the plaintiffs, was not called upon.

MORTON, C. J. The defendant made a special contract with the plaintiffs as copartners to do work for him. In any suit to enforce this contract or any liability growing out of it, both partners must be joined as plaintiffs. The defendant contracted with them jointly, not with either of them separately. The dissolution of the partnership before the work was completed had no effect upon the rights or liability of the defendant. It did not authorize the plaintiffs to sever the contract and sue the defendant separately. They must still sue jointly. *Page v. Wolcott*, 15 Gray, 536. Having fully performed the contract on their part, so that nothing remains but a mere duty of the defendant to pay money, they may maintain either of the common counts which is appropriate. *Morse v. Sherman*, 106 Mass. 430.

Exceptions overruled.

HOPEDALE MACHINE COMPANY vs. THOMAS C. ENTWISTLE
& others.

Worcester. Oct. 3. — 20, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

A written agreement provided that the defendant should work for the plaintiff for one year from a date named; that the plaintiff should pay the defendant for such labor a specified sum per month; that any inventions made by the defendant "while in his [the plaintiff's] employ" should be the plaintiff's property; and that the defendant should assign them accordingly. The defendant remained in the plaintiff's employ after the expiration of the year, and certain inventions were made by him afterwards. *Held*, on a bill in equity to enforce specific performance of this agreement, that the words "while in his employ" must be construed with reference to the duration of the agreement; and that the defendant was not bound to assign to the plaintiff inventions made by him while employed by the plaintiff after the expiration of the year.

A written contract, which by its terms has expired, cannot be considered as existing afterwards from the fact that it has been so treated by the party against whom it is sought to be enforced, or from the fact that he has made oral statements that he was bound by it.

DEVENS, J. This bill in equity is brought to enforce the specific performance of a written agreement, by which the defendant Entwistle agreed, as is alleged, for the consideration therein named, that any inventions which he might make relating to machinery built by the plaintiff, while he was in its employ, should be the property of the plaintiff; that he would assign all his interest in such inventions to the plaintiff, and do all acts necessary to make such assignment valid and effectual. The written contract, which was dated January 24, 1876, provided that the defendant should work for the plaintiff for one year from January 1, 1876, and that the plaintiff would pay him therefor certain specified sums per month. It further provided that any inventions made by the defendant while in the employ of the plaintiff should be its property, and that he would assign them accordingly. The defendant continued in the employ of the plaintiff after January 1, 1877, and the inventions, assignments of which are sought by this bill, were made thereafter.

It is the contention of the plaintiff that, whatever other provisions of the contract may have terminated by the expiration of the year, the words "while in its employ," in the connection in which they are found, bound the defendant to assign any of

his inventions, thereafter made, to the plaintiff, and constituted a written contract to that effect. But an expression, which, if it stood alone, would be general and unlimited in time, if found in a contract thus limited, must be construed with reference to the duration of the contract, unless a contrary intent quite clearly appears. Although the inquiry concern but a single clause, the contract is to be construed with reference to its object and the whole of its terms. It was one by which the plaintiff agreed to hire the defendant, and the latter agreed to work for the plaintiff, for one year. Compensation is provided for during that time only, and it is in terms treated as ending on January 1, 1877. Upon notice, under certain circumstances, the defendant might be absent "during the time covered by this contract." No provision beyond the year is made on either side for further labor or employment. Where the words "while in its [the plaintiff's] employ" are used, they must refer to the employment provided for by the contract, and be limited to a year, although the contract might be terminated within that time by three months' notice. It would be an unwarranted construction to hold that the defendant had agreed, by the phrase in question, to make assignments of his inventions, if ever employed thereafter by the plaintiff, when no agreement had been made for subsequent employment, and when, if subsequently employed, it must have been upon a different contract, however its terms might have resembled that which had terminated.

If such be the true construction of the contract, it is not important, in an action upon it, that it has been treated since as existing by acts on the part of Entwistle which recognized it, or that oral statements have been made by him that he was bound by it. They could not thus give it efficiency. To hold otherwise would be to hold that a written contract which by its terms had expired might still exist as such. Such acts and declarations might perhaps tend to establish a subsequent oral contract, into whose terms might have been incorporated by reference those to be found in a previous written contract. No such oral contract was set forth or relied upon. The finding of the judge, upon this evidence, that the parties understood and treated the written contract as existing after the year had ended,

could not therefore enable the plaintiff to obtain a decree upon it as such.

Bill dismissed.

T. G. Kent, for the plaintiff.

D. S. Richardson & G. F. Richardson, (*W. H. Anderson* with them,) for the defendants.

ASA E. EDMUNDS vs. EDWARD S. HILL.

Worcester. Oct. 3.—20, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

In an action of replevin, if the plaintiff claims title to the property replevied under a bill of sale given to him by a third person, which is contended by the defendant to be fraudulent as against the creditors of such person, the defendant is not entitled to introduce evidence that a mortgage, given by the third person to the plaintiff more than a year after the date of the bill of sale, is also fraudulent as to creditors, no connection being shown between the two transactions.

That a person receipted for property, attached as the property of another, under a bill of sale from whom the former claimed title, will not prevent him from maintaining an action of replevin against the purchaser of the property at a sale by the attaching officer.

If a person, acting as the agent of another, buys at a sale property which has been attached as the property of a person other than the owner, and takes possession of and claims to hold it for his principal, no demand upon him by the owner is necessary before commencing an action of replevin therefor.

DEVENS, J. This is an action of replevin. The plaintiff claimed title to the property under a bill of sale given to him by his son, John E. Edmunds, and dated August 4, 1876, which was asserted by the defendant to be fraudulent, and intended to prevent the property from being attached by the creditors of John E. In order to maintain this, he was permitted to show that the property remained in the possession of John E.; that the plaintiff exercised no ownership over it; that when attached as the property of John E. the plaintiff receipted for it; and that, when sold by the officer, the plaintiff made no public objection or assertion of his ownership. Mortgages were given by John E. to the plaintiff of other personal property on March 26, 1878; and the defendant offered to show, by the cross-examination of John E. Edmunds and other evidence, that these latter mortgages were fraudulent, and intended to keep the property

covered up and concealed from creditors. This evidence was properly excluded by the presiding judge. The creditors, by virtue of the judgment in favor of whom the sale was made under which the defendant justified, did not become such until more than a year after the bill of sale in dispute was made, and no connection whatever was offered to be shown between it and the mortgages. They constituted distinct and independent transactions, in no way connected with it. Unless this connection was shown, the relations between the plaintiff and John E. Edmunds, in 1878, the then financial condition of the latter, and the purposes and motives which then induced conveyances of property from one to the other, had no legitimate bearing upon the title conveyed by the bill of sale made in 1876.

Nor did the plaintiff waive his title to the property by receipting for it. This was legally entirely consistent with an intention ultimately to assert title, should circumstances render it desirable for him so to do. The receipt was indeed a promise to deliver over the goods to the officer. Having done this, he might then bring his action of replevin, trespass or trover to test his right. Failing to do this, in an action brought against him upon the receipt, nominal damages only could be recovered if the property were shown to be his. *Johns v. Church*, 12 Pick. 557. *Bursley v. Hamilton*, 15 Pick. 40.

The defendant further contends, that, in the absence of a demand for, and a refusal of, this property, the action could not be maintained; and that the instructions to the jury were erroneous, which stated that if the defendant, acting for one Pratt (whose agent he was), bought the property at the sale from the sheriff, took possession of it and claimed to hold it for Pratt, exercising authority and dominion over it, no demand was necessary to enable the plaintiff to maintain the action. Upon the circumstances thus detailed, of which there was evidence, there was an assertion by the defendant of a right of property inconsistent with that of the plaintiff, and the exercise of dominion in regard to it which was equally so. Demand and refusal are never necessary, except as furnishing evidence of an unlawful taking or detention against the rights of the true owner, in an action of replevin, or of an unlawful conversion, in an action of trover. When the circumstances, without these, are sufficient to prove

such taking or detention, they are superfluous. As, upon the finding of the jury, the property was that of the plaintiff, the officer was but a trespasser, who could convey no title, and the possession of it by the defendant was an unlawful detention. *Gilmore v. Newton*, 9 Allen, 171. Upon this point the case cannot be distinguished from *Blanchard v. Child*, 7 Gray, 155, where there was a wrongful sale of the plaintiff's property by the bailee in denial of the plaintiff's right, participated in by the defendant, who was the purchaser, and who claimed to hold the property by a title inconsistent with and adverse to the right of the plaintiff, and it was held that no demand was necessary to enable him to maintain the action, which was replevin.

Exceptions overruled.

J. L. Hunter & W. A. Williams, for the defendant.

A. J. Bartholomew, for the plaintiff.



ADIN THAYER, Judge of Probate, vs. CHARLES WINCHESTER.

Worcester. Oct. 4. — 20, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

The Probate Court has no jurisdiction to grant to an executor and residuary legatee, who has given a bond conditioned to pay debts and legacies, a license to sell the real estate of his testator for the payment of debts and charges of administration; and a sale under such license does not deprive the widow of a devisee of a portion of the land sold of her dower therein, or constitute a breach of the bond by which she is injured.

CONTRACT for the benefit of Elizabeth L. Corey, against a surety on a bond given by Jonas Corey, the executor and residuary legatee of Polly Corey. Trial in this court, without a jury, before *C. Allen, J.*, who allowed a bill of exceptions, in substance as follows :

Polly Corey died on April 24, 1865, leaving a will, which was duly proved and allowed, and also leaving as her heirs two sons, Jonas Corey and Charles A. Corey. Jonas Corey was nominated executor of the will. He was duly appointed executor by the Probate Court on May 22, 1865, and gave the bond in suit,

which was conditioned to pay the debts and legacies of the testatrix.

The testatrix, after making a few specific and general legacies, gave and devised to her son Charles A. Corey one undivided half of her real estate situated in Ashburnham, and certain personal property, and then gave to Jonas Corey all the rest and residue of her property, real and personal. On April 27, 1865, Charles A. Corey gave to Jonas Corey a quitclaim deed of all his interest in the real estate of the testatrix. Elizabeth L. Corey was the wife of Charles A. Corey at the time of the death of the testatrix, and is now his widow, he having died on September 28, 1870.

On February 4, 1868, Jonas Corey filed an inventory of said estate, by which the real estate was appraised at \$2750, and the personal estate at \$728.75, and on that day he petitioned the Probate Court for a license to sell the whole of the real estate of the testatrix for the payment of debts and charges of administration, to which petition Charles A. Corey assented in writing. The petition was granted by the Probate Court on said February 4, Jonas Corey giving the bond required by law, and on November 10, 1868, he sold all of said real estate by public auction under said license of the Probate Court, for \$2455; and on June 1, 1869, he rendered his account of administration on said estate in the Probate Court, charging himself, among other items, with the proceeds of said sale of real estate. To this account Charles A. Corey assented, and asked to have the same allowed.

Jonas Corey as executor has paid all the debts of the testatrix, and settled with Charles A. Corey, taking his receipt in full. The real estate of the testatrix consisted of houses and several lots of improved land in Ashburnham. Elizabeth L. Corey contends that the sale of the real estate bequeathed to her husband, Charles A. Corey, by Jonas Corey as executor, under the license of the Probate Court as above set forth, he having given a bond to pay the debts and legacies, was a breach of the conditions of said bond; that she was dowable in said real estate, and by said sale she has been deprived of her dower.

Upon these facts, the judge ordered judgment for the plaintiff; and the defendant alleged exceptions; and it was agreed

that, if the acts of the executor did not constitute a breach of the condition of the bond, judgment was to be entered for the defendant.

H. C. Hartwell, for the defendant.

D. H. Merriam, for the plaintiff.

DEVENS, J. That an action might be maintained on this bond for the benefit of Mrs. Corey, if she had been deprived, by the conduct of the executor in neglecting to pay the debts of the testatrix, of her dower estate in the land devised, and that she is a person entitled to the benefit of it, cannot be fairly controverted. The bond which the executor gave was one to pay debts and legacies. Its effect was to vest the real estate at once in the devisees, subject only to such right as exists in creditors to take it for the payment of their debts. Gen. Sts. c. 93, § 3. In the land devised to her husband, she had therefore at once an inchoate right of dower, which has since become absolute by his death, and with which she has not parted by any conveyance of her own. The bond which a residuary legatee may give to pay debts and legacies, if the judge of probate permits, is a conclusive admission of assets for those purposes, and the executor is not bound to return an inventory or an account to the Probate Court. It takes the place of the property in providing for the payment of debts and legacies, and is for the protection, not merely of all to whom they are immediately due, but of all who are legally interested that they shall be paid, and who are damaged if they are not so paid. *Jones v. Richardson*, 5 Met. 247. *Clarke v. Tufts*, 5 Pick. 337, 340. *Colwell v. Alger*, 5 Gray, 67. If Mrs. Corey, therefore, had lost this valuable estate in the land devised to her husband by reason of the neglect of the executor to pay the debts of the testatrix, and hence its appropriation by the creditors, she might maintain this action, as she was directly interested in the performance of the condition of the bond. *Paine v. Gill*, 13 Mass. 365.

No creditor levied upon the land devised and thus appropriated it. Gen. Sts. c. 93, § 4. But on February 3, 1868, Jonas Corey, the executor, petitioned the Probate Court for a license to sell the whole of the real estate of the testatrix for the payment of debts and charges of administration. On February 4, 1868, such a license was granted, and, acting thereunder, the executor

sold the whole of the real estate, including that devised to Charles A. Corey.

It is next to be considered whether the license was not wholly void for want of jurisdiction in the Probate Court. If so, no title passed to the purchaser, and Mrs. Corey has not been deprived of her right by virtue of any action which has been had thereunder. The Court of Probate is one of special and limited jurisdiction. If it exceed its powers, its decree may be avoided, not merely by appeal, but in collateral proceedings. The erroneous exercise of a power granted, or its indiscreet use, is to be remedied by appeal, but an act, for which no power is given to it, is simply a nullity. *Smith v. Rice*, 11 Mass. 507, 512. *Jenks v. Howland*, 3 Gray, 536. *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87. *Boston v. Robbins*, 126 Mass. 384, 388. *Pierce v. Prescott*, 128 Mass. 140, 143.

It is said by Chief Justice Shaw, in speaking of the Probate Court in *Peters v. Peters*, 8 Cush. 529, 543, "even where it has jurisdiction over the general subject," if it "exceeds its powers, or acts in a manner prohibited by law, its decrees . . . are held entirely and absolutely void and of no effect, and may be set aside in any collateral proceeding by plea and proof."

No authority existed in the Probate Court to grant a license, to sell real estate, to a residuary legatee and executor, who had given bond such as that now in suit. A creditor might levy an execution on the real estate of the testatrix, which had not been sold by the executor to a purchaser in good faith and for a valuable consideration, if he obtained judgment upon his claim. Gen. Sts. c. 93, § 4. The Probate Court could not authorize the sale, when, by its acceptance of the bond to pay debts and legacies, it had permitted the real estate, subject only to this right of the creditor, to vest absolutely in those to whom it was devised by the will. It had relieved the real estate from its jurisdiction, and, when no inventory was to be returned, it could not know that the personal assets were not amply sufficient to pay the debts. The residuary legatee and executor, having once admitted assets, could not be allowed to deny the fact of their existence. Such admission was conclusive. To permit him to enforce a charge upon the real estate, when, by giving a bond, which stood in place of the property to all interested in the

administration, he had been allowed to dispense with the ordinary safeguards against waste, would be manifestly unreasonable. *Gore v. Brazier*, 3 Mass. 523, 542. *Clarke v. Tufts*, 5 Pick. 337, 339. *Thompson v. Brown*, 16 Mass. 172.

Where a bond for faithful administration is given, no license to sell the real estate will be granted to the executor, if those interested therein will give bond, to the approval of the Probate Court, to pay the debts and legacies. Gen. Sts. c. 102, § 9. By such a bond, as by the bond in suit, the place of the real estate, so far as it is needed for the payment of debts, &c., is supplied.

It is suggested that, even if the license to sell the real estate was improvidently granted, it was granted by a court of competent jurisdiction, and that no title thereunder can be avoided. The St. of 1864, c. 137, prescribes the 'requisites of a valid sale by executors, &c. under license of court, and directs that, where these are complied with, no sale shall be avoided by reason of irregularity in the proceedings. Among these it is required that the license shall appear to have been granted by a court of competent jurisdiction. Where a court is of special and limited jurisdiction, the facts essential to that jurisdiction must exist. To hold that, because, under certain circumstances or upon a certain state of facts, the Probate Court had jurisdiction to authorize the sale of real estate, it was a competent court when they did not exist, would be to treat what are sometimes termed jurisdictional facts as unimportant. While the effect of the St. of 1864, c. 137, and of the statutes that preceded it, (Rev. Sts. c. 71, § 38, c. 72, § 20, Gen. Sts. c. 102, § 47,) has not been the subject of extended discussion, it has been treated as indicating only that a license by the Probate Court to sell real estate was not to be held void by reason of anything which affected only the mode of proceeding, and not as sanctioning or ratifying acts or decrees which were without authority. Thus in *Hannum v. Day*, 105 Mass. 33, it was held that, to obtain a license to sell land of a deceased person to pay debts, under the Gen. Sts. c. 102, §§ 1-3, where there were two or more executors, all must join in the petition; and that a license granted upon the petition of one was invalid. In *Tarbell v. Parker*, 106 Mass. 347, a sale of real estate to pay debts was held to be void, because at the time of granting the license there were no unpaid debts for which the

estate of a deceased person was legally liable, the Probate Court having no jurisdiction to grant the license under such circumstances. Nor does it detract from the weight of the latter decision, upon this point, that the St. of 1874, c. 346, § 2, has since provided that, when a license is granted for the sale of real estate for the payment of debts of a deceased person, the decision of the Probate Court as to the existence of such debts shall be final, so far as the same shall affect any title acquired by virtue of such license.

The Probate Court in the present case had no competent jurisdiction to license a sale of the real estate of the deceased. A conveyance made under and by virtue of it would not operate to deprive Mrs. Corey of her title. As dowager, she was entitled to enforce her right, which was only inchoate when the sale was made, as soon as it became absolute by the death of her husband, by action against the purchaser. Whether she may now be affected by the statutes for the quieting of title, which prescribe that actions for the recovery of real estate sold by an executor or administrator shall be brought within a limited period, need not here be considered. See Pub. Sts. c. 142, § 21. If such shall prove to be the case, it will be because she has voluntarily permitted a void title to become available against her by her own neglect to pursue her rightful demand.

But even if she might enforce her right of dower against the purchaser, it is contended that she is entitled to a remedy on the bond, because, having undertaken to dispose of this property, the executor has been guilty of maladministration. But if the property remained hers, she was not damnified. Had the pretended sale been one which was *prima facie* good, and thus only to be avoided by proper proceedings, there would be much force in the position that she should not be driven to attack and set it aside, but should be permitted at once to avail herself of this remedy against the executor. Such, we have seen, is not the case.

Reliance is placed by her upon *Chapin v. Waters*, 110 Mass. 195, and especially on the language of Mr. Justice Ames, who delivered the opinion of the court; but an examination of that case shows it to be distinguishable. The executor there had given a bond in the usual form for faithful administration. He

petitioned for leave to sell the testator's real estate for the payment of debts and legacies, but, in the statement in the petition of the assets in his hands, he did not include a debt due from himself to the estate. Had he included it, (which was his duty,) the excess of liabilities over the assets in his hands would have been practically nothing. This was held to be a breach of his bond for faithful administration. It is said by Mr. Justice Ames, that the executor "cannot excuse himself, upon such a charge of maladministration, by leaving the injured parties to take the doubtful chance of vacating the sale which was wrongfully made, by a suit at law against the purchaser." The case before him was one in which the Probate Court had jurisdiction, but was deceived in the exercise of it by the false representation of the executor as to the amount of the assets. The party for whose benefit the suit was brought had a right, if he so desired, to consider the sale, however improperly made, as a sale in fact, and as a violation of the official bond of the executor. "As there were debts to justify it," Mr. Justice Ames remarks, "the decree licensing the sale of real estate cannot be set aside to the injury of a *bona fide* purchaser." In the present case, no title was conveyed; no proceedings were necessary to set aside the sale; the position of Mrs. Corey was not changed by any acts which the executor has done.

Nor is the fact that the executor received the money for this land, including presumably that for the right of dower, one which should make him liable upon this bond. The sureties upon it are not responsible for moneys which he may have wrongfully received, while acting under void decrees of the Probate Court. They are responsible that the debts and legacies shall be paid to any one who may be injured by the failure so to do, and no further. If Mrs. Corey retained her title to dower in the land, she is not such a person, as she suffered no injury.

Judgment for the defendant.

OLIVE LUCIER *vs.* OLIVER MARSALES.

Worcester. Oct. 4. — 20, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

If a tenant at will of the mortgagor of land, after notification by the mortgagee, who enters upon the premises after condition broken, that he enters under his mortgage and to collect the rents and profits, makes no answer and continues to occupy the land, he is liable to the mortgagee for use and occupation of the land subsequent to the entry.

The facts, that a tenant at will of the mortgagor of premises had been notified by a purchaser of the equity of redemption of the mortgagor that he owned the premises, and requested to hold possession for him and to pay rent to him, which he agreed to do, and that, after an entry upon the premises by the mortgagee for condition broken and notification to the tenant to pay rent to him, the tenant, without replying to such notification, continued to occupy the premises and paid rent to such purchaser after the mortgagee's entry, it not appearing that the purchaser claimed adversely to the mortgagee, nor that, in paying rent to the purchaser, the tenant asserted any title adversely to the mortgagee, do not show that the tenant occupied adversely to the mortgagee.

W. ALLEN, J. The defendant was tenant at will of the owner of the equity of redemption of a parcel of land. The plaintiff, the mortgagee, after condition broken, entered upon the premises and notified the defendant that he entered under his mortgage and to collect the rents and profits. The defendant made no answer, and continued in the occupation of the premises. This action is brought to recover for use and occupation of the premises subsequent to the entry. Upon these facts, the plaintiff is clearly entitled to recover. The defendant contends that he held adversely to the plaintiff, so that no obligation to pay rent can be inferred. But that does not appear. Stevens, the purchaser of the equity, notified the defendant, who was in occupation as tenant at will of the mortgagor, that he owned the property, and requested the defendant to hold possession for him and to pay rent to him, which the defendant agreed to do. This was before the entry by the plaintiff, and only shows that the defendant became the tenant of the purchaser of the equity. After the plaintiff's entry, the defendant paid some rent to Stevens; but this was after the plaintiff's right to the rent was established, and it does not appear that Stevens claimed adversely to the plaintiff, nor that in paying the rent to Stevens the defendant asserted any title adversely to the plaintiff.

The plaintiff being in possession and entitled to the rents and profits, the defendant occupied with his assent. It is the case of a tenant at will of the mortgagor who continues to occupy, without objection, after entry by the mortgagee and notice to pay the rent to him. *Cook v. Johnson*, 121 Mass. 326. *Massachusetts Hospital Ins. Co. v. Wilson*, 10 Met. 126. *Shepard v. Richards*, 2 Gray, 424. *Bunton v. Richardson*, 10 Allen, 260. *Merrill v. Bullock*, 105 Mass. 486. *Judgment for the plaintiff affirmed.*

C. F. Stevens, for the defendant.

F. T. Blackmer, (*M. H. Cowden* with him,) for the plaintiff.



JOHN E. LEONARD vs. CHARLES N. HAIR.

Worcester. Oct. 5. — 20, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

A mortgagee of personal property may maintain an action for conversion, without proof of a demand and refusal, against an officer who sells the mortgaged property on an execution against the mortgagor, although the mortgagor was the purchaser at the sale, and then received and has since retained the possession of the property; and the measure of damages is the same as if the purchaser had been a stranger.

If an officer levies an execution on personal property which is subject to a mortgage, and afterwards sells the same on the execution, it is no defence to an action against him by the mortgagee for conversion, that after the seizure and before the sale he attached the property on a writ in favor of a third person, and the mortgagee made no demand upon him for the property.

W. ALLEN, J. This is an action of tort in the nature of trover for the conversion of a horse, brought by a mortgagee against an officer who sold the horse on an execution against the mortgagor. After the horse was taken on the execution, and the day before the sale, it was attached by the defendant on mesne process. It is contended by the defendant that the mortgagor was the purchaser at the sale, and then received, and has since retained, the possession of the horse. No demand was made for the property before the action was commenced. It is also contended by the defendant that, although the seizure and sale of the horse were unlawful, yet he had the lawful possession of the horse under the attachment until possession was delivered

to the mortgagor under the sale, and, for that reason, that the action cannot be maintained without proof of a demand and refusal, or, if maintained, that the plaintiff can recover but nominal damages. If the defendant had a right to hold the horse under the attachment, he did not exercise that right, but dissolved the attachment and converted the property by selling it on the execution.

The fact that the mortgagor was the purchaser, and received and retained the possession of the horse under the sale, can have no bearing upon the question of the conversion of the property, or upon the damages to be recovered. The delivery was to the purchaser as purchaser, not as mortgagor, and the possession was under the new title adverse to the plaintiff, and not under the old one recognizing his title. The plaintiff, it is true, can reclaim the property from the mortgagor, because purchaser, but only as he can from any other purchaser; whatever rights against him any purchaser would acquire were acquired by the mortgagor as purchaser, and a judgment satisfied in this action will vest the property in him as fully as it would in any purchaser. There has been no return of the property by the defendant. He did not deliver it to the mortgagor to hold as such, but to a purchaser to hold adversely to the mortgagee, for the purpose of defeating the possession of the mortgagee. As regards both the plaintiff and the defendant, the effect of a sale is the same when made to the mortgagor as to a stranger, and the rule of damages must be the same.

Judgment for the plaintiff.

F. T. Blackmer & C. R. Johnson, for the plaintiff.

F. A. Gaskill, for the defendant.

THOMAS SOUTHWICK vs. ATLANTIC FIRE & MARINE
INSURANCE COMPANY.

Worcester. Oct. 6. — 20, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

A description, in a policy of insurance, of the ownership of property as "his frame dwelling-house," by an assured whose only title thereto is under a quitclaim deed from a second mortgagee of the property, avoids the policy under a clause providing that, "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the benefit of the assured, the policy shall be void."

If a second mortgagee of property, who is also a co-assignee in bankruptcy of the estate of the mortgagor, makes a quitclaim deed of the property to a third person, this constitutes the latter an assignee of the second mortgage, and does not pass the interest of the grantor as co-assignee in bankruptcy; and the equity of redemption remains in the assignees in bankruptcy.

DEVENS, J. This is an action on a policy of insurance, by which the defendant insured Margaret Hale against loss or damage by fire to the amount of four hundred dollars, "on her frame dwelling-house," in Worcester, payable in case of loss to the plaintiff, who was in fact the holder of a first mortgage on the house, although he is not described as such in the policy. The fourth clause of the policy provided that, "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the benefit of the assured, the policy shall be void."

Upon the facts as they appeared as to Mrs. Hale's title and ownership of the property, the presiding judge ruled that the action could not be maintained on account of the erroneous statement thereof. Where one represents himself as the entire, unconditional and sole owner of property, and it is insured on that condition, it being clearly stipulated that, if he is not, the policy shall be void, the insurers can only be bound by their contract as they have made it. The inquiry is therefore presented whether the title or claim which Mrs. Hale had to this property was that of "entire, unconditional and sole ownership."

The policy was for a period of three years from November 28, 1878. Nathan S. Hale owned this estate, subject to two mortgages, on January 18, 1876, and, having become bankrupt, Joel

Knapp and Samuel Utley were regularly appointed his assignees in bankruptcy. On October 16, 1876, Knapp, who was not only one of the assignees in bankruptcy, but a second mortgagee by virtue of a mortgage which covered the property in question together with other property, made a quitclaim deed of this estate to Mrs. Hale. This deed did not by its terms convey or purport to convey the interest which Knapp had as co-assignee in bankruptcy. The power to sell vested in the assignees jointly, and was only to be exercised under the order and direction of the court. U. S. Rev. Sts. § 5066. Its only intent and effect were to convey the right which Knapp individually had in the property, and, although in form a quitclaim deed, it would operate to make Mrs. Hale the assignee of the second mortgage which Knapp then held. *Hunt v. Hunt*, 14 Pick. 374. *Welch v. Priest*, 8 Allen, 165. *Crosby v. Taylor*, 15 Gray, 64. The equity of redemption remained with the assignees.

In *Jenkins v. Quincy Ins. Co.* 7 Gray, 370, it was held that representations, in answer to questions in an application to a mutual insurance company for insurance on buildings, that the premises were owned by the applicant and were unincumbered, when in fact he was only a mortgagee, avoided the policy, under a by-law of the company (to which the policy and application were subject) providing that, unless the applicant should make a true representation of his title and interest in the property, and also of all incumbrances, and the amount and nature thereof, the policy should be void.

Mrs. Hale had undoubtedly an insurable interest in the premises, but she could not truly represent that she was the entire, unconditional and sole owner thereof. Before she could become so, she must necessarily obtain or remove the title of the owners of the equity of redemption, and that of the holder of the first mortgage. It is not important that she was actually in possession by a tenant. Her title was defeasible upon the payment of the debt secured by the second mortgage, and, even if she had remained in possession for a sufficiently long time and under such circumstances as to foreclose it, there would still have been a title superior to her own in the holder of the first mortgage, which she could only defeat by payment of the debt due thereon. The possibility that one may become the owner of property, or

have the right to become so on certain terms or conditions, is quite different from actual ownership. *Exceptions overruled.*

B. W. Potter, for the plaintiff.

F. P. Goulding, for the defendant.

JAMES PRYOR vs. LOVELL BAKER & another.

Worcester. Oct. 6. — 20, 1882. ENDICOTT, LORD & FIELD, JJ., absent.

Under a single mortgage of three distinct parcels of land, situated respectively in three different towns in the same county, containing a condition that, on default in the payment of the sum secured thereby, the mortgagee might "sell the granted premises, or such portion thereof as may remain subject to this mortgage, in case of any partial relief therefrom, in said town, on the premises," a sale by him of one of the parcels, by public auction, for breach of the condition, in accordance with the terms of the power in the mortgage, and in form legally conducted, is valid, although the amount realized from the sale, which is indorsed on the mortgage note, is less than the amount of the debt secured by the mortgage.

DEVENS, J. The defendant Lovell Baker was the mortgagee, by virtue of a single deed, of three distinct parcels of land, situated respectively in the towns of Rutland, Millbury and Leicester in the county of Worcester. By the conditions of his mortgage, he was entitled, on default in the payment of the sums secured thereby, to "sell the granted premises, or such portion thereof as may remain subject to this mortgage, in case of any partial relief therefrom, in said town, on the premises." Other provisions were made as to advertising, &c., not important now to be considered. The mortgagee, for breach of the condition, advertised and sold by public auction, in Rutland, to John L. Baker the tract situated in that town, indorsing the amount received, which was much less than the debt, upon the mortgage. He did not then advertise or sell the other tracts of land, although he has since done so. It is found that this sale made by the mortgagee was according to the terms of the power, and in form legally conducted, unless it be, as matter of law, that advertising and selling this lot alone, being a part only of the real estate embraced in the mortgage, invalidated the sale. This is

the contention of the plaintiff, who brings this bill in equity to redeem the parcel first sold from the mortgage, and who holds a title which would give him the right to redeem if such sale were not lawfully made. His right is to be determined by that of the mortgagor, (from whom he has subsequently derived title,) as it was affected by the sale.

The question does not present itself, whether the subsequent sales made by the mortgagee were valid, by which he undertook to dispose of the other tracts of land included in his mortgage. The validity or invalidity of the latter sales cannot affect either the title of the plaintiff or of John L. Baker, who was the purchaser of the Rutland tract. If it be conceded that the terms of the power of sale permit only a single advertisement and sale of the mortgaged premises, and that the power to sell would be exhausted by a single act, the question recurs whether the mortgagee might not lawfully sell a single parcel unconnected with other parcels, even if he did not thereby obtain enough to satisfy the mortgage. The exercise of a power to sell by a mortgagee is always carefully watched, and is to be exercised with careful regard to the interests of the mortgagor. *Montague v. Dawes*, 14 Allen, 369. The mortgage contemplated that a portion of the land might be relieved therefrom, and a sale made of the remainder. If the effect of this sale has been to relieve the other parcels from the power of sale, the mortgagor has no ground of complaint.

Had all the tracts been advertised, and, upon the sale of one, enough had been received to satisfy the mortgage, the mortgagee could not have proceeded to sell the other tracts. If, after such an advertisement, upon the sale of one, enough not having been received to satisfy the mortgage, he sees fit to proceed no further with the sale, no injury can have been done to the mortgagor. If the effect of such a transaction has been to exhaust the power of sale, or to release the remaining parcels, it would be certainly an advantage.

The cases of *Fowle v. Merrill*, 10 Allen, 350, and *Torrey v. Cook*, 116 Mass. 163, cited by the plaintiff, do not sustain his position. The one was a sale of an equity of redemption by the mortgagee, who thus sought to retain his mortgage on the premises; the other, the sale of an undivided half of the premises.

These were held invalid. They were attempts to sell an estate in the mortgaged premises, instead of the premises themselves, which alone the mortgagor was authorized to convey. The sale in the present case was that of a distinct tract, in a different town from the other tracts included in the mortgage, and, as to this tract, the power was well and effectually executed.

Bill dismissed.

D. Manning, Jr., for the plaintiff.

F. A. Gaskill, for the defendant.

CENTRAL MILLS COMPANY vs. JAMES STEWART & another.

Worcester. Oct. 9. — 20, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

A bond to dissolve an attachment, duly executed by a third person, who receives the property attached, by which he agrees to pay the amount of any judgment which may be recovered by the creditor in the action in which the attachment was made, is given upon sufficient consideration, and is valid, although it does not contain the condition required by the St. of 1875, c. 68, § 2.

If an action is brought against A. and B. jointly, and process is served only upon A. and his property alone attached, and a bond is given by a third person to dissolve the attachment, in which the action is described as against A. alone, and the condition is to pay any judgment that may be recovered in that action, and judgment is rendered against A. alone, the bond sufficiently identifies the action.

CONTRACT on a bond, dated January 31, 1881, executed only by James Stewart and John H. Autcliff, "as sureties," and reciting that whereas the plaintiff "has caused the goods and estate of P. T. Walsh, to the value of one hundred dollars, to be attached on mesne process, in a civil action, by virtue of a writ, bearing date the seventeenth day of January, A. D. 1881, and returnable to the First District Court of Southern Worcester, to be holden at Southbridge, within and for the county of Worcester, in said Commonwealth, on the twenty-eighth day of February next; in which writ said Central Mills Company is plaintiff, and said P. T. Walsh is defendant; and whereas said defendant wishes to dissolve the said attachment, according to law: Now therefore, if the above bounden Stewart and Autcliff shall pay to the plaintiff in said action the amount, if any, which he shall

recover therein, within thirty days after the final judgment in said action, then the above written obligation shall be null and void; otherwise, to remain in full force and virtue." Writ dated May 3, 1882.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon an agreed statement of facts, in substance as follows:

On January 17, 1881, the plaintiff commenced an action against P. T. Walsh, John Walsh and Anthony Walsh, on a writ returnable before the First District Court of Southern Worcester, and caused a car-load of old iron, then standing at the railroad station in Southbridge, to be attached on the writ, and caused a summons to be served upon P. T. Walsh, but none was served upon either John Walsh or Anthony Walsh; and the writ was duly entered in that court, on February 28, 1881.

The defendants in this action made a claim to the iron so attached, but afterward offered to give a bond in order to obtain possession of the iron, and entered into the obligation sued upon. The attachment was released, and the defendants received the iron. The District Court rendered judgment for the plaintiff, from which judgment an appeal was taken to the Superior Court, and the appeal was duly entered therein. The action was tried in the Superior Court, and judgment was rendered for the plaintiff against P. T. Walsh, for the sum of \$44.08 debt or damage, and \$55.66 costs of suit, dated March 31, 1882, and on April 19, 1882, execution was issued on that judgment, and demand for payment was duly made; and thirty days from the time of issuing the execution having expired, and the judgment not being in any part satisfied, after due notice to these defendants this action was brought.

J. M. Cochran, for the plaintiff.

C. F. Stevens, for the defendants.

DEVENS, J. The bond in suit is not such a bond as is required by statute, which being given, and the proper steps in relation thereto being complied with, operates to dissolve an attachment without the plaintiff's consent. Gen. Sts. c. 123, §§ 104-106. St. 1875, c. 68, § 2. But the creditor may voluntarily consent to dissolve an attachment by which he has sought to secure his debt, and, if he does so at the request of any one,

a promise by such a person to pay the debt sought to be secured, either before or after judgment, is made upon a valid legal consideration. The bond by which the defendants agreed to pay the amount of any judgment which the plaintiffs might recover against P. T. Walsh in an action brought by them against him on a writ dated January 17, 1881, was therefore made upon sufficient consideration, which the defendants received by the surrender to them of the property attached, and was good at common law. *Mosher v. Murphy*, 121 Mass. 276. *Smith v. Meegan*, 122 Mass. 6.

The defendants suggest no reason why the plaintiff should not recover upon it, except that the bond does not correspond to the writ, which was against Anthony and John E., as well as P. T. Walsh, although process had been served only upon the latter, and it was his property which was the subject of attachment. If a person desires to release his own property only from attachment, and to escape any liability for a judgment that may be rendered against his co-defendant, he may give bond simply to secure such judgment as may be recovered against himself. *Campbell v. Brown*, 121 Mass. 516. Such bond may equally be given on his behalf. The language used in the bond in suit shows that it was intended to be binding in case of a judgment against P. T. Walsh. *Eveleth v. Burnham*, 108 Mass. 374. Although there was no attempt to describe the suit except as one against P. T. Walsh, in which his goods were attached, it was sufficiently identified by the attachment from which the goods were released to the defendants upon the execution of the bond. No responsibility was assumed by the defendants unless this suit resulted in a judgment against him such as has actually been rendered. The suit was sufficiently identified, and it cannot be important that other defendants were named in it, especially in view of the fact that judgment was recovered against him alone.

Exceptions overruled.

JOSEPH SANTOM *vs.* JOHN S. BALLARD.

Worcester. Oct. 4. — 23, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

If a party who appeals from a judgment of an inferior court does not file a bond with surety to the adverse party, as required by the Pub. Sts. c. 154, § 52, and the St. of 1882, c. 95, § 1, conditioned to enter and prosecute his appeal, and to satisfy any judgment which may be entered against him in the Superior Court, on the appeal, for costs, the Superior Court has no jurisdiction of the action, and it may be dismissed at any time before judgment, although the appellee has entered a general appearance in the Superior Court.

CONTRACT, upon an account annexed, brought in the Central District Court of Worcester. That court gave judgment for the defendant for the costs of suit, from which the plaintiff appealed to the Superior Court, and, on May 22, 1882, he entered into a recognizance to enter and prosecute the appeal, and to satisfy any judgment which might be entered against him on the appeal. The defendant entered a general appearance in the Superior Court, and there moved that the action be dismissed for want of jurisdiction, because no bond to the adverse party had been filed by the plaintiff in the court from which the appeal was taken.

Upon hearing of the motion, the Superior Court allowed the same, and ordered the action to be dismissed; and the plaintiff appealed to this court.

C. F. Stevens, for the plaintiff.

H. F. Harris, for the defendant.

MORTON, C. J. The statutes require that the party appealing in civil proceedings in any municipal, police or district court in the Commonwealth shall, instead of entering into a recognizance, within twenty-four hours after the judgment appealed from, unless the time is extended by the court, file a bond with sufficient surety or sureties to the adverse party, with condition to enter and prosecute his appeal with effect, and to satisfy any judgment which may be entered against him in the Superior Court, upon said appeal, for costs. Pub. Sts. c. 154, § 52; c. 155, § 29. St. 1882, c. 95, § 1. Unless such bond is filed, no appeal can be allowed, but the municipal, police or district court retains jurisdiction of the case, and may proceed to issue execution upon its judgment. And, until the appeal is duly allowed,

the Superior Court, sitting as an appellate court, has no jurisdiction of the cause or the subject matter.

The case before us was brought in the Central District Court of Worcester, which rendered judgment against the plaintiff. He claimed an appeal, but did not file the bond as required by law. The Superior Court, therefore, had no jurisdiction of the case, and might dismiss it on its own motion, or on the motion of the appellee, at any time before judgment.

In many cases, where there has been an objection to the jurisdiction, because of some irregularity or defect in the service, or some merely technical defect in the process, it has been held that a general appearance by the defendant is a waiver of such objection. But this rule applies only in cases where the court has jurisdiction of the subject matter. Consent of parties may in a certain sense give jurisdiction of the person, but it cannot create a jurisdiction over the cause and subject matter, which is not vested in the court by law. *Brown v. Webber*, 6 Cush. 560. *Ashuelot Bank v. Pearson*, 14 Gray, 521. *McQuade v. O'Neil*, 15 Gray, 52. *Riley v. Lowell*, 117 Mass. 76.

The provisions of law requiring a bond are not wholly for the benefit of the appellee, but partly, upon considerations of public policy, to discourage frivolous and vexatious litigation. Parties cannot by their consent dispense with the bond, and thus, without complying with the law, divest the inferior court of its jurisdiction and transfer the case to the higher court. It follows that the Superior Court rightly dismissed the action.

Judgment affirmed.

MATILDA MORRIS *vs.* ISAAC FARRINGTON.

Worcester. Oct. 5.—23, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

Even if an action, under the Gen. Sts. c. 85, § 1, to recover treble the amount of money lost by gaming, is a local action, it is discretionary with the court, under the Gen. Sts. c. 120, § 70. and c. 183, § 14, to refuse to dismiss it when brought in the wrong county, if the defendant has appeared and answered to the merits. If a loser of money by gaming does not bring an action therefor within three months, under the Gen. Sts. c. 85, § 1, it will not defeat an action brought by another person, that the loser is to receive some benefit from the action, under an agreement between him and the plaintiff made after the right of action had accrued to the plaintiff, there being no covin or collusion between them by which suit was delayed by the loser.

In an action, under the Gen. Sts. c. 85, § 1, to recover treble the amount of money lost by gaming, the defendant was asked on cross-examination whether there had been any change in the occupancy of his premises in which the alleged loss occurred, and answered that there had not. *Held*, on a bill of exceptions which stated merely this question and answer, and not the connection in which the question was put, that the defendant showed no ground of exception to the admissibility of the question and answer.

TORT, under the Gen. Sts. c. 85, §§ 1, 2, to recover of the defendant; as the owner of a certain building on Hanover Street in Boston, in the county of Suffolk, treble the amount of a sum of money alleged to have been lost and paid by one John Morris to the winners thereof, by playing at cards in said building, with the knowledge or consent of the defendant, on May 21, 1881. The writ, dated October 14, 1881, was returnable to the Superior Court for the county of Worcester. The answer contained a general denial, and alleged that the action was not brought in accordance with the statute.

At the trial, before *Mason, J.*, after the plaintiff had read the pleadings, and before any further proceedings in the case, the defendant moved that the action be dismissed, for the reason that the court had no jurisdiction of the subject matter, and that the action was not in accordance with the Gen. Sts. c. 123, § 8. The judge overruled this motion.

The defendant asked the judge to rule that, if there was any covin or collusion, at any time previously to the date of the writ, between the plaintiff and the alleged loser of the money, or any agreement between the plaintiff and any person by which the alleged loser was to receive any benefit from an action brought

against this defendant, the jury must render a verdict for the defendant. The judge refused so to rule; but instructed the jury that they must be satisfied that there was no fraudulent agreement, between the plaintiff and the person who lost the money sought to be recovered, that he should delay bringing an action, and that the delay, of the person who lost the money sought to be recovered, to bring an action within three months was without covin or collusion between himself and the plaintiff.

During the trial, the plaintiff, on cross-examination, asked the defendant if there had been any change in the occupancy of the premises or business, referring to the room where the alleged gaming took place. The defendant objected to this question. But the judge permitted it to be answered, and the witness answered that no change had occurred.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

E. A. Alger & W. E. Boynton, for the defendant.

D. F. Crane, for the plaintiff.

MORTON, C. J. 1. The defendant contends that this is a civil action for the recovery of a forfeiture, which by the statute could be brought only in the county of Suffolk; that it is therefore a local action, and the Superior Court sitting for the county of Worcester had no jurisdiction. Gen. Sts. c. 123, § 8. Pub. Sts. c. 161, § 11.

But, if we can regard this as a local action, the Superior Court was not required, as matter of law, to allow the defendant's motion to dismiss. The statutes provide that, "when it appears on a trial that a local action has been brought in an erroneous venue, the court may of its own motion order a nonsuit to be entered, unless good cause shall be shown why the trial should be allowed to proceed." Gen. Sts. c. 129, § 70. Pub. Sts. c. 167, § 73. It is also provided that, when judgment is rendered in a local action brought in an erroneous venue, the court shall issue its execution directed to the sheriff of the proper county, so that the judgment may be duly executed. Gen. Sts. c. 133, § 14. Pub. Sts. c. 171, § 14. It has been held that, under these provisions, it is within the discretion of the court, whether a local action brought in an erroneous venue, in which the defendant has appeared and answered to the merits, shall be dismissed,

or proceed to trial. *Putnam v. Bond*, 102 Mass. 370. *Osgood v. Lynn*, 130 Mass. 335. These cases are decisive of the case at bar, and the defendant's exception to the refusal of the Superior Court to dismiss the action cannot be sustained.

2. The statute provides that, "if the loser does not within three months after such loss, without covin or collusion, prosecute with effect for such money or goods, any other person may sue for and recover treble the value thereof in an action of tort." Gen. Sts. c. 85, § 1. Pub. Sts. c. 99, § 1.

We think the construction of this provision adopted by the Superior Court was correct, and that, to defeat the plaintiff's right of action, there must be shown some covin or collusion between herself and the loser, by which the loser was induced to delay bringing an action within three months after the loss.

If the loser did not bring his action within three months after the loss, there being no covin or collusion between himself and the plaintiff to affect his action or inaction, a right of action vested in the plaintiff to recover three times the amount of the loss; and the statute does not provide that this right shall be defeated by any agreement between the plaintiff and the loser, by which the latter is to receive some benefit from the suit made after the cause of action had vested in the plaintiff. The court therefore rightly refused to give the instructions requested by the defendant.

3. The question put to the defendant in his cross-examination, as to whether there had been any change in the occupancy of his premises in which the loss by gambling occurred, is not shown to have been inadmissible. The aspect of the case at the time it was put may have been such as to make it admissible, upon the issue of his knowledge that the premises were used for purposes of gambling, or to test his credit and truthfulness. The bill of exceptions shows nothing as to the connection in which it was put, and fails to show that there was error in admitting it.

Exceptions overruled.

BENJAMIN F. ELLIS & others vs. CLARENCE S. ELLIS,
executor.

Plymouth. Oct. 17. — 19, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

On the issue whether a testator was of sound and disposing mind at the time of the execution of his will, a witness, who had testified that he saw the testator a short time before, and again after, he had been prostrated by a shock of paralysis, by which it was contended the testator's mental incompetency was occasioned, was asked the following question: "What was the testator's condition and appearance, as regarding his conduct and conversation at the latter interview, as compared with his conduct and conversation at the former interview?" *Held*, that the question was properly excluded.

APPEAL from a decree of the Probate Court, allowing the will of Joseph Ellis.

At the hearing, before *Devens*, J., the will was contested, on the grounds that the testator was not of sound and disposing mind, and was under influence at the time the will was executed. It appeared in evidence that, about a year before the will was executed, the testator had been prostrated by a shock of paralysis; and it was contended by the appellants that the testator's mental incompetency was mainly occasioned by such shock. A witness called by the appellants testified that he saw the testator a short time before, and again after, the shock. For the purpose of showing the testator's mental and physical condition after the shock, and shortly before the time of the execution of the will, the appellants' counsel put to the witness the following question: "What was the testator's condition and appearance, as regarding his conduct and conversation at the latter interview, as compared with his conduct and conversation at the former interview?" This question was objected to by the appellee, and excluded by the judge, in this form, the judge stating that, though any facts observed by the witness before or after the shock might be stated, having relation to the condition of the testator, the question as proposed called for an expression of opinion and comparison of opinion, and not a comparison of facts. To this ruling the appellants alleged exceptions.

E. Davis, for the appellants.

P. Simmons, for the appellee.

BY THE COURT. The question put by the counsel of the appellants, and excluded, was ambiguous. It might, and probably would, be understood by the witness as calling for his opinion as to the mental condition of the testator. It was competent for the court to require the appellants' counsel to change the form of his question so as to avoid this ambiguity.

Exceptions overruled.

JESSE P. DOUGLASS vs. JOHN F. NICHOLS.

Plymouth. Oct. 17. — 23, 1882. ENDICOTT, LORD & C. ALLEN, JJ., absent.

The plaintiff in a personal action, brought originally in the Superior Court, who recovers a verdict of \$21.16, of which \$20 is for the original debt and \$1.16 is for interest from the date of the writ, is entitled to costs, under the Pub. Sts. c. 198, §§ 1, 5.

APPEAL from the taxation of costs in an action of contract upon an account annexed for \$25, for work and labor, brought originally in the Superior Court. The jury returned a verdict for the plaintiff in the sum of \$20, with interest from the date of the writ, \$1.16, making a total of \$21.16. Judgment was ordered for the plaintiff upon the verdict, and costs were taxed for him by the clerk; from which taxation the defendant appealed to the court. The court affirmed the taxation; and the defendant appealed to this court.

A. Lord, for the plaintiff.

E. Robinson & M. Reed, for the defendant.

MORTON. C. J. In personal actions brought originally in the Superior Court, except actions of replevin, if the plaintiff finally recovers a sum not exceeding twenty dollars for debt or damages, he is entitled to no costs, except when the title to real estate or an easement is concerned, or when his claim originally exceeded twenty dollars, and is reduced by set-offs to twenty dollars or less; but if he recovers more than twenty dollars, he is entitled to full costs. Pub. Sts. c. 198, §§ 1, 5-7.

In the case before us, the jury returned a verdict for the plaintiff for \$21.16. Of this, \$20 was for the original debt, and \$1.16 for interest from the date of the writ.

In *Joannes v. Pangborn*, 6 Allen, 243, it was held that, where a plaintiff in a personal action recovered a verdict of \$20, he was entitled to no costs, although by our statutes interest is to be added to the verdict in making up the judgment, which in such case must therefore exceed \$20. The court there say, "The question of costs or no costs must properly rest on the verdict itself, and any addition thereto, arising from an allowance of interest thereon subsequently, does not affect this question." But interest which accrues before the verdict stands upon different ground. Whether it accrues by way of contract or by way of damages after a refusal to pay the original debt upon a demand, it is a part of the debt or damages for which the jury must render their verdict. In this case, the form of the verdict is not important; it is a verdict assessing damages in the sum of \$21.16. The plaintiff "finally recovers" that amount "for debt or damages," and is therefore entitled to his full costs.

The cases of *Kidder v. Oxford*, 116 Mass. 165, and *First Baptist Society v. Fall River*, 119 Mass. 95, cited by the defendant, arose under a different statute, and have no bearing upon the question before us.

Taxation affirmed.

CHARLES D. LOTHROP vs. CHARLES H. ADAMS & others.

Essex. Nov. 7, 1879; Nov. 3, 1881. — Oct. 20, 1882. W. ALLEN & C. ALLEN, JJ., absent.

In an action for a libel published in a newspaper, the defendant is not entitled, for the purpose of showing that he had no malicious intention, to prove that there were reports in circulation, similar to those contained in the newspaper, before the publication of the libel, without showing that he knew of such reports.

In an action for libel, in charging the plaintiff with ill-treating his family, there was evidence that the plaintiff had, on a certain occasion, kicked a daughter. The wife of the plaintiff, who testified for him, denied the kicking. On cross-examination, she was asked by the defendant whether her son was present on the occasion, and answered that he was. The defendant then asked her whether the

son had subsequently been asked by the plaintiff what he should say if asked if his father kicked the daughter. The witness answered in the affirmative. *Held*, that the judge, before whom the case was tried, might in his discretion allow the plaintiff to ask the witness what the son said in reply, although the son was present at the trial, and was not called as a witness.

In an action for libel, in charging the plaintiff with cruelly treating one of his children, the defendant put in evidence that the plaintiff had whipped a daughter. The plaintiff then testified that he whipped her because he believed that she had been stealing. *Held*, that the defendant had no ground of exception to the refusal of the judge to allow him to show that the daughter had not in fact been guilty of stealing.

Under the Gen. Sts. c. 129, § 77, which provide that, in a civil action for libel, the defendant may upon the trial give in evidence the truth of the matter charged as libellous, "and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved," if a libel is published in a newspaper owned by copartners, all the partners are responsible for the express malice of one of them.

If a newspaper publishes a statement that, at the trial of A. before an ecclesiastical tribunal, the testimony showed certain facts, which are set forth, and which are libellous in their character, and A. brings an action against the owner of the newspaper for libel, declaring upon the statement so published, and the answer sets up the truth of the statement, the defendant is not entitled to a ruling that he is not called on to show that the plaintiff was not guilty of the matters alleged.

Although a newspaper has the right to publish a fair report of the proceedings before an ecclesiastical tribunal, yet if a report in a newspaper contains defamatory matter, and does not purport to be a full report of the proceedings, and the answer to an action of libel based upon such report does not set up the defence of privilege, the jury cannot treat it as privileged.

In an action for libel, the defendant asked the judge to instruct the jury that, if the charges proved were of such a nature or character that the existence of those not proved, if any, would not affect the plaintiff, he could recover only nominal damages. The judge instructed the jury that, if they should find that some of the charges were true and some not true, they should give the plaintiff only such damages as he had proved that he had sustained solely by reason of those that were not true. *Held*, that the defendant had no ground of exception.

TORT, in seven counts, against the proprietors of a newspaper, called the Springfield Republican, for publishing in said paper, at different times, false and malicious libels of and concerning the plaintiff, a minister, in respect to his treatment of his family. Writ dated October 16, 1876.

The fifth count alleged that, on September 12, 1876, the defendants published in their said paper a false and malicious libel, as follows: "Amherst. Trial of Rev. C. D. Lothrop. Special despatch to the Republican. The trial of Rev. Mr. Lothrop for cruelty to his family was begun before the First Church in secret session last evening, the accused not being present. The

testimony covered the training of the three daughters from their infancy up, and was of the most revolting character, involving brutal horsewhippings for trivial offences, systematic starving, feeding of rotten meat, and positive dishonesty and faithlessness in his family relations."

The answer admitted that the articles set forth in the declaration were published in the Springfield Republican, and that the defendants were, at the times they were published, proprietors of that newspaper; alleged that in publishing said paper they simply presented to the public those matters of general interest, public, political, personal and general news, which as journalists they believed to be in the interest of society and the public good; that in commenting upon the acts or character of any individual they had not been actuated by malice or any malicious motive; that in publishing the acts or misconduct of any public person, or person holding a position like that of the plaintiff, which of itself would tend to procure him the trust and confidence of the community in which he lived, they were governed entirely by what they considered as their duty in presenting to the public those facts which they fully believed to be true; and they denied that they falsely and maliciously published any articles concerning the plaintiff; and averred that all the articles published by them were substantially true. The answer further set forth, that the plaintiff was tried by his church, and the testimony at such trial fully proved all the various matters set forth in the fifth count; and that the plaintiff was found guilty and expelled from membership in said church.

Trial in this court, at April term 1879, before *Morton, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff rested his case upon the pleadings. The defendants then put in their evidence, and the plaintiff put in evidence in rebuttal.

1. One Henry, of Amherst, where the plaintiff resided at the time of the publication of the alleged libels, testified that he had resided in Amherst a number of years prior to said publications, had been engaged in the provision business there, had known the plaintiff for several years prior to said publication, and had frequently traded with him. The defendants' counsel put the following question to the witness: "State whether

or not there were reports of the brutal treatment of his children by the plaintiff prior to the first publication of such reports in the Springfield Republican." This question was objected to by the plaintiff, and excluded by the judge. It was not contended that this was offered, as evidence of any general reputation, on the question of damages. It appeared in evidence, that one Griffin was the chief local editor of the Springfield Republican in 1876; that Griffin had sent an assistant local editor or reporter to Amherst, before the publication of the alleged libels, to investigate the matters concerning the plaintiff, the result of whose inquiries were published in the Springfield Republican.

2. The testimony of Emma M. Lothrop and of Mary S. Lothrop, children of the plaintiff, tended to show that on the morning of March 31, 1876, which was the eighteenth birthday of Mary, there was a disturbance in the plaintiff's family; that Mary was whipped on her hand with a slipper by the plaintiff; that the wife of the plaintiff had an ill turn and was sitting on the chamber stairs; that, while there, Mary was by her side for the purpose of ministering to her wants, and that, while there, her father struck her on the side of her head with his hand, and kicked her. Mrs. Lothrop, the wife of the plaintiff, was a witness for the plaintiff, and testified as to what took place on that morning, and, among other things, testified that the plaintiff did not kick Mary. On cross-examination, the defendants' counsel asked her if her son Charles was present at what occurred on that morning, to which she answered in the affirmative. The defendants' counsel then asked her whether, in a subsequent conversation, Charles had been asked by the plaintiff what he should say if he was inquired of as to whether his father kicked Mary that morning, to which she answered in the affirmative. No further questions were asked her upon this subject by the defendants' counsel. Upon reëxamination, the plaintiff's counsel asked her what reply Charles made to the said inquiry. This question the defendants' counsel objected to, but the judge ruled that it was competent, and the witness testified that Charles said his father did not kick Mary. Charles was in court during the trial, and was not called by either party, which fact was commented upon by the respective counsel in their arguments.

3. The plaintiff testified that some years ago he whipped his daughter Anna, in the attic, with a small riding whip, because he believed that she had been guilty of wrongfully taking things that did not belong to her; that she had taken the other children's money to buy oranges with, and then said that they were given to her by one Stearns. The defendants offered to show by Anna that she was not guilty of stealing, and that the oranges were in fact given her by said Stearns. They also offered to show by Stearns that the oranges were in fact given by him to Anna. The judge ruled that it was not competent to show merely that the plaintiff was mistaken as to the facts upon which he acted in inflicting punishment, and that the testimony, offered to show merely that Anna was not guilty of the acts for which she was punished, was collateral and immaterial, and excluded the evidence upon this ground, and also upon the ground that it was not admissible as of right in this stage of the case.

4. The defendants asked the judge to rule, that express malice of one of the defendants could not affect the other defendants, unless it appeared that they participated in such malice; and if the jury should find a verdict on the ground of express malice, they could find it as to those only who were shown to be actuated by such malice. The judge refused so to rule.

5. The defendants asked the judge to rule, "that the defendants are not called upon to show that the plaintiff was guilty of systematic starving, or feeding rotten or unwholesome meat to his children, or that he was guilty of dishonesty and faithlessness in his family relations, the declaration of the plaintiff not setting forth that the defendants made any such charges against him." The judge declined to give this instruction.

6. The defendants asked the judge to instruct the jury, "that the fifth count, being a fair report of the trial before the First Church at Amherst, and so admitted to be by the plaintiff, is not libellous;" but the judge, not understanding that such admission had been made, declined so to instruct the jury, but ruled that, although a public newspaper has the right to publish a fair report of the proceedings before a court or an ecclesiastical tribunal, yet, as this article contains allegations against the plaintiff which are defamatory, as it does not purport to be a full report of the proceedings, and as the defence of privilege is not

set up in the answer, the jury cannot treat it as privileged, and therefore not libellous.

7. The defendants asked the judge to instruct the jury, that, "if the charges proved are of such a nature and character that the existence of those not proved, if any such there are, would not affect the plaintiff, then he is entitled to recover only nominal damages." The judge had previously instructed the jury, that, if they should find that some of the libels are true and some are not true, then their duty would be to give the plaintiff only such damages as he had proved that he had sustained solely by reason of those which were not true; that they must not give him any damages for such charges as were proved to be true, but only such damages, if any, caused by the additional untrue charges. The judge declined to give the instruction in the language requested, deeming that it had been covered by the instructions already given.

The jury rendered a verdict for the plaintiff, in the sum of \$1000; and the defendants alleged exceptions.

The case was argued at the bar in November 1879, by *D. Saunders & C. P. Thompson*, (*C. G. Saunders* with them,) for the defendants; and by *S. B. Ives, Jr.*, (*G. B. Ives* with him,) for the plaintiff; and was reargued in November 1881, by *Thompson & C. G. Saunders*, for the defendants; and by *S. B. Ives, Jr.*, for the plaintiff.

FIELD, J. 1. The question "whether or not there were reports of the brutal treatment of his children by the plaintiff prior to the first publication of such reports," which was ruled out by the court, was not put for the purpose of introducing evidence affecting the damages. It is contended, that, as one of the issues in the cause was whether the defendants published the truth with malicious intention, the fact of the existence of such reports would be pertinent on the issue of malicious intention, because malice might be inferred if the reports published were invented by the defendants, and might not, if they published only what was currently reported. But, without absolutely deciding this, and without considering how far the cases, cited by the plaintiff, of *Clark v. Munsell*, 6 Met. 373, 389, and *Bodwell v. Swan*, 3 Pick. 376, have any application to this question, it is manifest that, to make the existence of these reports competent in this

view, it is necessary that the defendants should have known of their existence before the publication. As reports unknown to the defendants, they have no relevancy to the intention with which the defendants made the publication, and no offer appears in the exceptions to show that the defendants knew of these reports before the publication. The exceptions therefore do not show that the defendants were aggrieved by the ruling.

The exceptions state that it appeared in evidence that one Griffin was the chief local editor of the Springfield Republican in 1876; that Griffin had sent an assistant local editor or reporter to Amherst, before the publication of the alleged libels, to investigate the matters concerning the plaintiff, the results of whose inquiries were published in the Springfield Republican. Apparently, then, the defendants were not prohibited from showing that what they published was the result of inquiries made in Amherst, and, under the circumstances, we are not to presume that the defendants, in offering evidence of reports of brutal treatment, at the same time offered to show that they were known to the defendants before their publication, or called the attention of the presiding justice to the pertinency of the evidence offered, with other evidence to be offered, to show a want of malicious intention.

2. The reply of Charles, when asked what he should say "if he was inquired of as to whether his father kicked Mary," it was within the discretion of the presiding justice to admit.

The practice has been to permit testimony that a material witness is living and within the jurisdiction of the court, and then to permit argument to the jury upon the inferences to be drawn from the fact that he has not been called. In this case the defendants' counsel went further, and asked a witness if the plaintiff had asked Charles what he would say if he were inquired of as to whether he kicked Mary, and the witness answered in the affirmative. The inference to be drawn from this was that the plaintiff knew what Charles would testify, and, as he did not call him, that Charles, if he had testified, would have testified against the plaintiff. To rebut this inference, the reply of Charles was admitted. As evidence of any fact in issue, the whole of this testimony was incompetent, but, as bearing upon the fairness of the conduct of the trial by the plaintiff, we think

it was within the discretion of the presiding justice to admit it. If the fact of the inquiry was admitted, the reply was admissible. *Clark v. Fletcher*, 1 Allen, 53.

3. The defendants, among other things in the alleged libel, charged the plaintiff with cruel and abusive treatment of one of his children. The plaintiff rested his case upon the pleadings. The defendants then introduced their evidence, a part of which related to the plaintiff's whipping his daughter Anna. The plaintiff then testified that he whipped Anna because he believed her guilty of stealing. The defendant then offered evidence that Anna was not guilty of stealing. This evidence was rejected by the court, because it was not competent to show merely that the plaintiff was mistaken in the facts upon which he acted, and also upon the ground that it was not admissible as of right at this stage of the case. The ruling was clearly right.

4. In a civil action for a libel, before the passing of any statute on the subject, the truth of the words published was a defence, whether they were published with or without malice; but if the words published were false, it was no defence that the person who published them believed them to be true, unless the communication was privileged. Except, then, in cases of privileged communications, it was generally true that evidence of actual malice or of the want of actual malice was immaterial to the right of action, and was admissible, if admissible at all, only for the purpose of enhancing or diminishing the damages.

The Gen. Sts. c. 129, § 77, provide that, "In every prosecution and in every civil action for writing or for publishing a libel, the defendant may upon the trial give in evidence the truth of the matter contained in the publication charged as libellous; and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved." This is a reënactment of the St. of 1855, c. 396. For previous statutes, see Rev. Sts. c. 100, § 19; c. 133, § 6; St. 1826, c. 107, § 1. Since the passage of the St. of 1855, c. 396, the truth of the words published is no longer an absolute defence; the plaintiff may, notwithstanding the words are true, maintain his action if he can show that they were published with malicious intention.

The defendants in this case were copartners, engaged in the publication of a newspaper. The court was requested by the

defendants to rule "that express malice of one of the defendants could not affect the other defendants, unless it appeared that they participated in such malice; and if the jury should find a verdict on the ground of express malice, they could find it as to those only who were shown to be actuated by such malice." The court refused to give this ruling. The statute undoubtedly, by using the words "malicious intention," means an actual malicious intention, which the defendants in their request properly enough denominate "express malice." The malice which it has been said the law ordinarily implies, in actions of slander or libel, from the uttering or publishing of false defamatory words, is in one sense a fiction, invented to satisfy the forms of pleading. The words "express malice" have been used, in contradistinction to the malice which it was said the law implies, to mean actual malice, or malice in fact, which is the same thing as malicious intention. The correctness of the ruling asked for must be determined by the rules of law applicable to civil actions, in which a specific actual intention or purpose must be shown to exist in order to maintain the action. But it has been established, on much consideration, as one of the general principles of the law of agency, that the principal is liable civilly in damages for the torts of his agent done for his benefit in the prosecution of his business, and within the scope of the agent's employment, and this rule has been extended to wilful trespasses, fraudulent misrepresentations, malicious prosecutions and libels. The greatest difficulty has been felt in extending this liability to corporations aggregate. *Reed v. Home Savings Bank*, 130 Mass. 443, was an action of tort against a savings bank for malicious prosecution. In the opinion Mr. Justice Lord says, "By the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation;" and many authorities are cited. For additional authorities when the action is for a libel, see *Aldrich v. Press Printing Co.* 9 Minn. 133; *Maynard v. Fireman's Fund Ins. Co.* 47 Cal. 207; *Johnson v. St. Louis Dispatch Co.* 2 Mo. App. 565.

In *Philadelphia, Wilmington & Baltimore Railroad v. Quigley*, 21 How. 202, it was held that a corporation may be responsible

for the publication of a libel. The court below had instructed the jury that they might find exemplary damages. This was held erroneous, because "the circumstances under which the evidence was collected, and the publication made, repel the presumption of the existence of malice on the part of the corporation, and so the jury should have been instructed;" but the opinion of the majority of the court does not intimate that, on proper evidence, express malice might not be shown against a corporation.

In *Whitfield v. South Eastern Railway*, El., Bl. & El. 115, which was an action of libel against a corporation, Lord Campbell, C. J. says: "But, considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

In *Lawless v. Anglo-Egyptian Cotton & Oil Co.* L. R. 4 Q. B. 262, which was an action of libel against a corporation, it was held that the publication was *prima facie* privileged, and that there was no evidence of express malice which ought to have been left to the jury; but it was not intimated that a corporation aggregate could not be guilty of express malice in the publication of a libel. See *Mackay v. Commercial Bank*, L. R. 5 P. C. 394.

In criminal prosecutions for a libel in this Commonwealth, the liability has been restricted to acts in which the defendant participated, or to which he assented. *Commonwealth v. Morgan*, 107 Mass. 199, 203. In England at one time the law was thought to be otherwise, but it is now governed by the St. of 6 & 7 Vict. c. 96, § 7. *Regina v. Holbrook*, 3 Q. B. D. 60, and 4 Q. B. D. 42.

The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of

his employment in his business, it is just that he should be held responsible for it in damages.

As partners are the general agents of each other and of the firm, within the scope of the business of the partnership, we think a test of the question we are considering is the liability of the proprietor of a newspaper in damages for a libel maliciously published without his knowledge by his agent, whom he has entrusted with the management of the newspaper, and this we regard as well settled. *Shepherd v. Whitaker*, L. R. 10 C. P. 502. *Dunn v. Hall*, 1 Ind. 344. *Andres v. Wells*, 7 Johns. 260. *Perret v. New Orleans Times Newspaper*, 25 La. An. 170. *Storey v. Wallace*, 60 Ill. 51.

Smith v. Ashley, 11 Met. 367, rests on its own facts, and decides nothing in reference to the liability of a principal for the malicious acts of his agent, done for his benefit, in the prosecution of his business within the scope of his employment.

Upon this ground of agency, partners have been held liable in civil actions for the fraudulent or malicious conduct of one of them, done without the knowledge of the others, for the benefit of the partnership and within the scope of its business. *Locke v. Stearns*, 1 Met. 560. *Gray v. Cropper*, 1 Allen, 337. *White v. Sawyer*, 16 Gray, 586. *Durant v. Rogers*, 87 Ill. 508. *Wolf v. Mills*, 56 Ill. 360. *Chester v. Dickerson*, 54 N. Y. 1. *Guillou v. Peterson*, 89 Penn. St. 163. *Rex v. Marsh*, 2 B. & C. 717, 723.

If the liability of the principal for the fraudulent acts of the agent, done within the scope of his employment, be limited to those cases in which the principal derives a benefit from the act of the agent, and a corresponding limitation be put upon the liability of one partner for the fraudulent acts of another, done within the scope of the partnership business, yet when a partnership publishes a newspaper, whatever benefit, if any, is derived from the publication of a libel is necessarily received by the partnership.

The statute requires that an actual malicious intention in making the publication shall be found, if the matter published be true; but we are of the opinion that the Legislature, in enacting this statute, did not intend to change the rules of law whereby one person is made responsible in damages for the wrongs done

by another, but left them to be applied according to the principles which govern the administration of the law; and that the court rightly refused to give the ruling requested.

5. An examination of the pleadings shows that the ruling asked for should not have been given.

6. The court rightly refused to rule as requested, and the ruling given was correct. It does not appear that it was admitted by the plaintiff that the libel alleged in the fifth count was a fair report of the trial before the Congregational Church. It was not set up in the answer that this was a fair and accurate report of the proceedings before the church, made *bona fide* and without malice. It does not on inspection appear to be such a report.

7. The instruction given was correct, and included the instruction asked for.

In the opinion of a majority of the court the entry must be
Exceptions overruled.

MERCHANTS' NATIONAL BANK *vs.* EDWARD THOMPSON
& another.

Suffolk. March 20. — Oct. 20, 1882. ENDICOTT, LORD & C. ALLEN, JJ.,
absent.

A number of persons associated themselves together to purchase of a corporation a large parcel of flats. As part of the consideration, the flats were to be filled by the corporation within seven months. The conveyance was made to trustees of the associates; and the interests of the latter were divided into shares, and the trustees issued to each associate a certificate of the number of shares belonging to him. Each associate paid to the corporation in money ten per cent of his proportion of the entire consideration, and executed to the corporation his personal bond for the payment of the remaining ninety per cent of his proportion, payable one half in two years and one half in three years, with interest semiannually, and transferred to the corporation his certificate of shares, as collateral security for the payment of the bond. The bond also contained a clause, by which it was agreed that the whole or any part of it might be paid, when interest was payable, and that when paid either by advance payments, or by the regular payment of instalments, the shares pledged should be released. By the terms of the transfer, the corporation was authorized to receive any dividends which might be made by the trustees, and, on payment of the bond "by said dividends or otherwise," the certificate was to be reassigned to the owner

Each certificate contained this clause: "Said share is transferable by assignment in writing on this certificate, recorded on the books of the trustees, and not otherwise, except when the share is pledged; in which case the interest of the general owner therein may be assigned in writing, approved by the trustees, and recorded in the books." By the terms of a declaration of trust, the trustees were to manage and dispose of the property from time to time, and to divide the net proceeds of sales among the general owners of the shares at the time of declaring dividends, or as such owners might order in any assignment of their shares as collateral security; and that, unless expressly provided in the instrument creating the pledge, the pledgor should alone be entitled to vote or to receive dividends. *Held*, on a bill in equity, that the corporation, taking one of these certificates as collateral security for the payment of a bond, was not obliged to hold it until paid by dividends arising from the proceeds of the sale of the land, but was entitled, upon default in payment of the bond, to foreclose the pledge by a sale of the certificate.

W. ALLEN, J. The defendant Thompson was one of several individuals associated to purchase from the Boston Water Power Company, a corporation, certain lands in Boston called the Huntington Avenue Lands. The lands were conveyed to trustees, upon trusts declared in a declaration of trust, referred to in the deed of conveyance. The interests of the purchasers were divided into shares, and there was issued to each purchaser a certificate of the number of shares belonging to him. The certificates contained the following provision, "and said share is transferable by assignment in writing on this certificate, recorded on the books of said trustees, and not otherwise, except when the share is pledged; in which case the interest of the general owner therein may be assigned in writing, approved by the trustees, and recorded in the books." By the declaration of trust, the trustees had full authority to protect, manage and dispose of the property on the most advantageous terms. The intention of the purchasers was to sell the property from time to time, in small parcels, after it was improved and prepared for such sales. At the time of the conveyance, the lands consisted of flats, unfilled and mostly covered with water, and a part of the consideration of the purchase was the agreement of the Boston Water Power Company to fill and otherwise improve the property, within seven months. The price to be paid, which included the consideration for this agreement of the Water Power Company, was \$1 a foot. The arrangement was that the conveyance should be made to the trustees, and certificates issued to each of the associates named in the declaration of trust for his shares, and that

he should pay his proportion of the whole purchase money to the Boston Water Power Company, ten per cent of it in cash, and the remainder in his bond secured by a pledge of his certificates. The defendant Thompson received the certificate of five shares mentioned in the bill, and gave his bond to the Boston Water Power Company for \$23,000, dated December 9, 1871, payable, one half on December 9, 1873, and one half on December 9, 1874, with interest, at the rate of seven per cent per annum, payable July 1, 1872, and semiannually thereafter, and assigned his certificate as collateral security therefor. The plaintiff has acquired the right and interest of the Boston Water Power Company in the bond and certificate. One of the shares has been transferred by the defendant Thompson to the other defendant, but subject to the plaintiff's rights. The bond is unpaid except \$1000 of the principal, and \$275 of the interest.

The plaintiff now brings this bill in equity, and the question presented is, whether the plaintiff has a right to a decree for a foreclosure, either by an absolute transfer to it, or by a sale, of the interest of the defendants in the certificates. If it has the right of foreclosure, it is entitled to relief in equity, not only from that fact, but because the shares now stand in the names of the defendants on the books of the trustees, and can be transferred only by them, and such transfer, or some instrument of conveyance executed by the defendants, is necessary to give a clear title to them.

The declaration of trust provides that "the net proceeds of sales shall be divided among the parties who may be the general owners of the shares . . . at the time of declaring dividends, or as such owners may order in any assignment of their shares as collateral, semiannually or oftener;" and that "the trustees shall issue to each purchaser, or his assigns, one or more certificates expressing his interest under this trust," which "shall be transferable only by assignment recorded upon books to be kept by the trustees. In case of any pledge or transfer of such shares as collateral security, the transfer shall express upon the face of the certificate the amount of the debt intended to be secured, and the name of the debtor; and the pledgor or his assigns, unless expressly provided in the instrument creating the pledge, shall alone be entitled to vote or to receive dividends, or be

notified as herein provided, and in general shall alone be entitled to the rights of an owner. And, in general, the party appearing upon the books of the trustees to be the owner shall alone be deemed entitled to notice, or to any of the rights of an owner." It is further provided, that "any shareholder or his assigns may at any time sell his shares, or any of them, but subject in all respects to the terms of this trust; and the assignee in all transfers must be approved by the trustees," with the further provision that the owner may sell to an assignee not approved by the trustees if they do not within twenty days offer to take the stock for the common benefit at the price offered. The instrument of the assignment of the certificate to the Boston Water Power Company authorized the company and their assigns to receive the dividends.

We see nothing in the facts of this case to prevent the application of the general rule, that the pledgee of personal property has authority to sell the property after default in the payment of the debt secured. Whatever rights the plaintiff has, it holds under the assignment of the certificate, and the transfer of the certificate will give whatever rights it is entitled to, whether the right represented in the certificate is a chose in action or an equitable interest in land.

The pledge of property to secure the payment of a debt implies authority to change the property into money to apply on the debt, if the pledgor fails in his duty to pay it; the usual and ordinary mode of changing property into money is by selling it, and a pledge ordinarily includes a power of sale upon default. Story on Bailments, § 308. *Parker v. Brancker*, 22 Pick. 40, 46. The exceptions to the rule illustrate it. A pledge of commercial paper does not include authority to sell it, at least before it is due and default made in its payment, because the proper and usual mode of converting it into money is to receive the money when it becomes due upon it. *Wheeler v. Newbould*, 16 N. Y. 392. *Fletcher v. Dickinson*, 7 Allen, 23. So a savings-bank book cannot be sold by a pledgee. *Boynton v. Payrow*, 67 Maine, 587. In New Jersey, an ordinary note and mortgage pledged cannot be sold; *Morris Canal & Banking Co. v. Fisher*, 1 Stock. 667; but coupon bonds may be. *Morris Canal & Banking Co. v. Lewis*, 1 Beas. 323. The question

is one of contract; where there is no express agreement, the intention of the parties, as to the mode by which the security shall be converted into money, must be implied from the nature of the property pledged, and the circumstances of the transaction.

The defendants contend that the intention of the parties to the pledge was, that the pledgee should rely, as the means of meeting any default in payment of the bonds secured, upon the dividends to be made from the proceeds of land to be sold, and not upon a sale of the certificates; and rely, in support of this, upon the fact that, by the agreement of the Boston Water Power Company, the pledgee, the filling and improvement of the lands were to be completed by it, within a period which would expire before the bonds would become due, upon the expectation of all parties that the land would be speedily sold after the completion of the improvements, and upon various provisions of the certificate and the declaration of trust, which have been referred to.

It may have been the expectation of the parties that the bonds would be paid from the proceeds of the sales of the land, but that intention is not expressed or implied in the terms of the assignment, or the circumstances under which it was made, or the nature of the property pledged. The interest of the defendants, constituting the property pledged, was put in the form of certificates, like stock in a corporation, and particular provisions made for its transfer. It was evidently the intention of the parties that the associates should have power to sell their interests, and their expectation that shares would be frequently transferred, absolutely, and in pledge, the only restriction not usual in regard to stock in corporations being the right of the trustees to purchase when a proposed assignee should not be approved by them. The certificate was evidence not only of a right to receive dividends, but of the right of the owner of it to have his proportion of the land set off to him in severalty, either by the consent of all parties in interest, or, upon the determination of the trust, by the action of a majority of owners of the certificates, and of other rights in the management of the property. The assignment of the certificate is general, to be held as collateral security for the due performance of the conditions of the bond, and provides that, on the payment of the bond by dividends or otherwise,

the certificate shall be reassigned to the owner or his assigns. In the bond itself it is agreed that the whole or any part of it may be paid on either of the days fixed for the payment of interest, and that when paid, either by advance payments or dividends, or by the regular payment of instalments, the shares pledged shall be released.

An assignment in such terms of a certificate representing such an interest, to secure the payment of a debt of the amount of ninety per cent of the par value of the shares, must have been intended to give something more than an authority to receive dividends as they should be declared. The assignment gives that authority expressly, but, by the terms of the deed of trust, that was necessary to give to the pledgee the right to the dividends. This provision itself indicates that a pledge of the stock was understood to give rights other than that to receive dividends. The fact that the Boston Water Power Company, the pledgee, had agreed to fill and improve the land, and that that agreement was part of the consideration of the bond, may have furnished a reason for securing the performance of that agreement by some provision in the bond or assignment of shares; but no such provision is found, and the fact itself is of little significance. The agreement was with the trustees, and the bond and certificate were, as part of the transaction, assigned to them by the Boston Water Power Company as security for its performance. The plaintiff holds by assignment of the trustees and the release of the company.

We do not think that this question is affected by the provision in the declaration of trust, that the pledgor, unless specially excepted, shall have the right to vote and receive dividends, and shall alone be entitled to the rights of an owner. This refers to him while he is pledgor; but, when the certificate is transferred under a foreclosure, he ceases to be the pledgor, and another person is substituted for him as owner, in compliance with the terms of the trust. It does not affect the relation between the pledgor and pledgee, but their relation to the trustees and associates while they retain that relation between themselves.

It was argued for the defendants, that the plaintiff was affected by any equities that existed between the defendants and the Boston Water Power Company; but nothing appears which

would show a defence against the company, if this suit were between it and the defendant Thompson.

We think that by the assignment to the Boston Water Power Company the entire interest of the defendant represented in the certificate was pledged to secure the debt, and that the ordinary right of foreclosure implied in a pledge of stock or personal property was included. The debt has long remained unpaid, and we think that the plaintiff is entitled to the relief sought.

The transfer, whether to the plaintiff itself or to a purchaser, must be with the approval of the trustees, or after refusal by them to purchase, as provided in the declaration of trust. If the certificate is sold, it would be subject to that condition; if it is transferred to the plaintiff, after the amount at which it is to be taken shall be ascertained, the trustees should have an opportunity to take it at that sum, as that will be sufficient compliance with the provision of the trust.

The case must be referred to a single judge to ascertain the amount due and settle the decree. *Ordered accordingly.*

R. Gray & H. W. Swift, for the plaintiff.

R. M. Morse, Jr., for the defendants.

THOMAS N. HART & another *vs.* JAMAICA POND AQUEDUCT CORPORATION.

Suffolk. Nov. 18, 19, 1880; Nov. 15, 16, 1881. — Oct. 23, 1882. W. ALLEN & C. ALLEN, JJ., absent.

A bill in equity against an aqueduct corporation, which was authorized by the St. of 1868, c. 182, to take land, to enlarge a pond on its land and to raise a dam on the land so taken, for the purpose of saving the water running to waste from the pond for aqueduct purposes, alleged that the corporation was sinking a deep well on land of which the plaintiff was the owner in fee, and which the defendant took under the statute, and was erecting thereon powerful hydraulic pumping machinery, to be used in pumping water from the well for the purpose of supplying water to its customers; that the plaintiff was the owner of other land adjoining that so taken, and also of valuable water-rights and privileges immediately below the land taken; and that such adjoining land and water-rights and privileges would be seriously impaired in value by the acts of the corporation, in tapping and drawing off the underground sources of supply of such water-rights and privileges. *Held*, on demurrer, that the bill stated a case within the equity jurisdiction of the court.

BILL IN EQUITY, filed June 21, 1880, to enjoin the defendant corporation from doing certain acts on land taken from the plaintiffs under the St. of 1868, c. 182. The defendant demurred to the bill, assigning for grounds of demurrer: 1. That the plaintiffs had a plain, adequate and complete remedy at law. 2. Want of equity. Hearing before *Colt, J.*, who sustained the demurrer, and dismissed the bill; and the plaintiffs appealed to the full court. The facts appear in the opinion.

The case was argued in November 1880, by *M. Williams, Jr.*, for the defendant, and by *A. D. Chandler*, for the plaintiffs; and was reargued in November 1881, by the same counsel.

MORTON, C. J. It was decided in *Attorney General v. Jamaica Pond Aqueduct*, ante, 361, that the acts of the defendant in sinking a well and erecting pumping machinery upon the land of the plaintiffs, taken under the St. of 1868, c. 182, were *ultra vires* and illegal. The only remaining question in this case is whether the bill states a case which is within the equity jurisdiction of the court.

The bill, after setting out the acts complained of, alleges that the plaintiffs are the owners in fee of the land taken by the defendant, and of other adjoining land, and also of valuable water-rights and privileges immediately below the land taken; and that the said adjoining land and their water-rights and privileges will be seriously impaired in value by the acts of the defendant in tapping and drawing off the underground sources of supply of said water-rights and privileges.

The illegal acts of the defendant, of which the bill complains, are the sinking of a deep well and the erection of powerful hydraulic pumping machinery, to be used in pumping water from said well, for the purpose of supplying water to the customers of the defendant.

The question is not what might be the rights of the plaintiffs, as against the owner of adjoining land, who, by digging wells or any lawful use of his land, intercepts underground currents so as to injure the plaintiffs. This may be *damnum absque injuria*. The defendant is not the owner of the adjoining land; it has only an easement in, or a right to use, for certain purposes, the adjoining land which belongs to the plaintiffs. If it exceeds its powers, its acts are illegal, and it stands in no better position

than would a stranger creating a permanent nuisance upon the plaintiffs' land to their irremediable injury.

The case stated is, that a quasi public corporation, exercising by delegation from the Legislature the right of eminent domain, is perverting and exceeding the powers granted to it, and is illegally constructing a work, which is perpetual and permanent in its nature, to the injury of the plaintiffs.

In an early case, when the jurisdiction in equity of this court was less extensive than it now is, it was stated by Chief Justice Shaw that, "where the party complained against professes to act by public authority, to enter upon, and to a certain extent to use the land of third persons, and exceeds his authority, it is held to be a peculiarly proper case for the interposition of a court of equity." *Boston Water Power Co. v. Boston & Worcester Railroad*, 16 Pick. 512.

In the case before us, as in that case, the other ground of equitable jurisdiction exists, that the work which the defendant proposes to do is permanent and perpetual in its nature. Taking the case as stated, it shows that the defendant is violating important rights of the plaintiffs to their serious injury, for the protection of which a court of equity alone can furnish an adequate and complete remedy. A writ of entry, or an action of tort for a nuisance, if followed by a filling up of the well, would not furnish a remedy equally complete. No one can tell what may be the effect of digging a deep well, interrupting underground streams and currents, or whether, if it were afterwards filled up, the streams and currents would be restored to their original courses. The mischief to the plaintiffs might be irremediable: We are of opinion that the plaintiffs' bill may be maintained. *Cadigan v. Brown*, 120 Mass. 493. *Fall River Iron Works v. Old Colony & Fall River Railroad*, 5 Allen, 221. *Winslow v. Nayson*, 113 Mass. 411. *Creely v. Bay State Brick Co.* 103 Mass. 514. *Dickenson v. Grand Junction Canal*, 15 Beav. 260. *Bostock v. North Staffordshire Railway*, 3 Sm. & G 283. *Lamb v. North London Railway*, L. R. 4 Ch. 522.

Demurrer overruled.

FRANKLIN FULLER vs. BOSTON & ALBANY RAILROAD
COMPANY.

Suffolk. March 13, 14. — Oct. 23, 1882. ENDICOTT & DEVENS, JJ., absent.

In an action against a railroad corporation for personal injuries, the declaration alleged that the defendant's road crossed a certain highway in a city at grade; that, on a day named, while the plaintiff was crossing the track on said highway, and in the exercise of due care, he was struck by one of the defendant's locomotive engines, and received the injuries complained of, "through the negligence and carelessness of the defendant, who carelessly omitted to give any signal while approaching said highway with said locomotive, or warning the plaintiff by ringing a bell or blowing a whistle, or by a flagman or otherwise, that it was dangerous or unsafe then to cross, by reason of the approach of said locomotive." *Held*, that the declaration set out a good cause of action against the defendant at common law, but did not sufficiently state a cause of action under the St. of 1874, c. 372, § 164; and that, under the declaration, the plaintiff could not recover, unless he was using due care when hurt.

TORT for personal injuries. The declaration was as follows: "And the plaintiff says that the defendant, at the time herein-after mentioned, owned and operated a railroad running from said Boston to Albany, in the State of New York; that there is a public highway extending from Washington Street to Federal Street, in said Boston, called Kneeland Street; that the defendant's track, locomotive and cars cross said highway at grade; that on October 15, 1880, while the plaintiff was crossing said track, on said highway, and in the exercise of due care, he was struck and knocked down by one of the locomotives of the defendant, and his left foot and ankle cut off by said locomotive and train of cars thereto attached, his right leg severely injured and bruised, and divers other wounds and bruises inflicted upon the body of the plaintiff through the negligence and carelessness of the defendant, who carelessly omitted to give any signal while approaching said highway with said locomotive, or warning the plaintiff by ringing a bell or blowing a whistle, or by a flagman or otherwise, that it was dangerous or unsafe then to cross, by reason of the approach of said locomotive."

At the trial in the Superior Court, before *Rockwell*, J., the defendant contended, and asked the judge to rule, among other things, that the plaintiff could not recover on his declaration, unless he was using due care when hurt. The judge refused so

to rule ; and gave instructions, the nature of which appears in the opinion.

The jury returned a verdict for the plaintiff ; and the defendant alleged exceptions.

A. L. Soule, for the defendant.

R. M. Morse, Jr. & W. H. Towne, for the plaintiff.

BY THE COURT. The declaration, which contains only one count, sets out a good cause of action against the defendant at common law. It does not sufficiently set out a cause of action under the St. of 1874, c. 372, § 164. *Wright v. Boston & Maine Railroad*, 129 Mass. 440. The learned judge who presided at the trial in the Superior Court held that the count set out two distinct causes of action, and allowed the plaintiff to go to the jury both upon the liability of the defendant at common law and on its liability under the statute. This was error. The defendant was entitled to the ruling asked, that the plaintiff could not recover on his declaration unless he was using due care when hurt. As there must be a new trial, it is not necessary to consider the other questions presented by the bill of exceptions.

Exceptions sustained.

HENRY E. MUNSEY *vs.* CHARLES H. BUTTERFIELD.

Middlesex. September 6. — October 20, 1882.

A. agreed to sell, and B. to purchase, A.'s milk route in certain towns, delivery to be made on a day named. In an action by A. against B. for breach of the agreement, in refusing to take the route and pay the consideration, A. testified, on cross-examination, that after he made the agreement, and before the day fixed for delivery, he bargained with C. to purchase his milk route, intending to run the same after B. took his route ; that C.'s route comprised a portion of the same territory which he sold to B. ; that he was not to disturb any of the customers of the route sold to B., but he considered he had a right to obtain new customers on the same route ; that he told B. he had bargained for C.'s route, and also told him he could not hold the customers in one of the towns unless he got there early in the morning. *Held*, on this evidence, that the judge, before whom the case was tried, rightly directed a verdict for the defendant.

CONTRACT for breach of an agreement in writing, dated February 24, 1880, by the terms of which the plaintiff agreed to sell

for \$2000, and the defendant agreed to purchase, certain articles of personal property used in the milk business, "also the good will of said Munsey's milk route lying in West Somerville, East Somerville, North Somerville and Charlestown," possession to be delivered on April 1, 1880.

At the trial in the Superior Court, before *Wilkinson, J.*, the plaintiff introduced evidence tending to prove the execution and delivery of the contract by the parties; and that, on April 1, 1880, the plaintiff left with a person at the house where the defendant lived a bill of sale of the property. The plaintiff testified that, a few minutes after he so left the bill of sale, he met the defendant a short distance from the house and told him that he had left the bill of sale at the house for him, and demanded the payment of the money according to the agreement; that the defendant then told him he should not take the property and that he should back out; and that the defendant had not taken the property or paid anything.

On cross-examination, the plaintiff testified that he sold the defendant the personal property and the good will of his milk route; that the good will was the main part of the value in the trade; that the personal property was worth from \$800 to \$1000; that, soon after the contract with the defendant was executed, the plaintiff bargained with one Wellington to purchase Wellington's milk route, intending to run the same after the defendant took his, which route ran over a portion of the same territory in Charlestown and Somerville as the route which he sold to the defendant; that he was not to disturb any of the customers of the route sold to the defendant, but that he considered that he had a right to obtain for himself new customers on the same location; that on March 12, 1880, he applied to the defendant for money, and told him that he wanted it to pay Wellington for his milk route, and told the defendant that he had bargained for said route, and also told him that he could not hold the customers in Charlestown unless he got there early in the morning.

Upon this evidence, the defendant asked the judge to rule that the plaintiff could not maintain his action. The judge so ruled, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

O. B. Mowry, for the plaintiff.

R. Lund & E. A. Upton, for the defendant.

W. ALLEN, J. By the agreement between the parties, made on February 24, 1880, the defendant agreed to accept and pay for certain personal property, to be delivered to him by the plaintiff on the first day of the next April. This action is brought to recover damages for the refusal of the defendant to accept the property. To maintain it, the plaintiff must prove that he offered, or was ready, to deliver the property. A material part of the property to be delivered was, as stated in the agreement, "The good will of said Munsey's milk route lying in West Somerville, East Somerville, North Somerville and Charlestown." This contract, called a sale of the good will of Munsey's milk route, was really, like the sale of the good will of any business, an agreement by the plaintiff that he would retire from it, and would allow the defendant to enjoy the benefits and advantages of it, and would do nothing to impair or injure it. This agreement was implied in the transaction, and in fact constituted the contract of sale of the good will of the milk route on the part of the plaintiff. *Dwight v. Hamilton*, 113 Mass. 175. The defendant did not agree to pay for the right to run a milk route over the territory. The plaintiff did not have that exclusive right. Neither did he agree to pay for the mere right or opportunity of getting customers in consequence of the plaintiff's withdrawal from the route. This is by no means all that constitutes the good will of a business; that is, as was said by Chief Justice Bigelow in *Angier v. Webber*, 14 Allen, 211, in language applied to such a sale by one member of a firm to another, but equally applicable to a sale to a stranger, "the benefit or advantage which had accrued to the firm, in addition to the value of their property, derived from their reputation for promptness, fidelity and integrity in their transactions, from their mode of doing business, and other incidental circumstances, in consequence of which they had acquired general patronage from constant and habitual customers." In the case at bar, the right which the defendant was to acquire was the right to the business of running the milk route as the circumstances, the conduct and the influence of the plaintiff had made it, and this right could be acquired only by the agreement of the plaintiff not to interfere

with the business, — not to use the opportunities and influences which had built it up to impair it. If the plaintiff, when he made the offer to deliver the property, upon which he relies, intended, and gave the defendant to understand that he intended, not to keep his implied agreement, which constituted a material part of the right or property to be sold and delivered, he did not make such an offer as the defendant was bound to accept, and the refusal of which would give the plaintiff a cause of action. The defendant was justified, by the conduct and declarations of the plaintiff, in believing, not only that he intended to run a milk route in competition with the defendant over a part of the territory included in the route proposed to be sold, but to run it in opposition to that, and not only to obtain new customers, but to divert old ones from the defendant; and that the plaintiff did not offer, and did not intend, to carry out his agreement.

Angier v. Webber, ubi supra, was a bill in equity for an injunction to restrain the defendants from violating an agreement to do nothing to impair or injure the good will in a teaming business between Boston and Somerville, which had been sold by the defendants to the plaintiff. The defendants bought the business of other licensed stands near that sold, and engaged in the business, but did not solicit the customers of the plaintiff except by holding themselves in readiness to do business. It was held that this was a breach of the agreement. Chief Justice Bigelow said: "These facts show that the defendants have done acts which tend directly to deprive the plaintiff of the benefit of the reputation of the old firm, to take away from him the patronage which appertained to it, and to draw away the business of its habitual customers, to which he had acquired a right by the purchase of the good will." This was even less than the plaintiff in the case at bar gave the defendant to understand that he intended to do.

We think that the plaintiff did not offer to the defendant the good will of the milk route, and that the defendant was justified in refusing to accept what was offered. In the opinion of a majority of the court, the ruling that the plaintiff could not maintain his action was correct. *Exceptions overruled.*

MEMORANDUM.

On the thirty-first day of October 1882, the Honorable WILLIAM C. ENDICOTT resigned the office of justice of this court, which he had held since the fifth day of March 1873.

COMMONWEALTH vs. PETER HUGHES.

Bristol. Oct. 24. — Nov. 7, 1882. LORD & C. ALLEN, JJ., absent.

It is no defence to a complaint for drunkenness, under the Pub. Sts. c. 207, §§ 26, 27, which alleges two previous convictions of a like offence within the next preceding twelve months, that the first conviction relied upon by the government was also previously relied upon to aggravate the second offence.

At the trial of a complaint, under the Pub. Sts. c. 207, §§ 26, 27, for drunkenness by the voluntary use of intoxicating liquor, and alleging two previous convictions of a like offence within the next preceding twelve months, evidence that "the defendant was found in the streets behaving in a drunken manner, staggering, and with a large crowd around him, and that his breath smelled of liquor," together with evidence that he had been twice within a year convicted of drunkenness by the voluntary use of intoxicating liquor upon his pleas of guilty, may rightly be submitted to the jury to determine whether the drunkenness of the defendant was caused by the voluntary use of intoxicating liquor.

COMPLAINT, under the Pub. Sts. c. 207, §§ 26, 27, for drunkenness by the voluntary use of intoxicating liquor. At the trial in the Superior Court, before Colburn, J., the jury returned a verdict of guilty; and the defendant alleged exceptions. The facts appear in the opinion.

L. L. Holmes, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

MORTON, C. J. The statutes provide that, if a male person is guilty of drunkenness, and he has been convicted of a like offence twice before within the next preceding twelve months, he shall be subject to a greater penalty than for a first or second conviction. Pub. Sts. c. 207, § 27.

In the case before us, the complaint is for the offence of drunkenness committed on April 16, 1882. It alleges that the defendant had been, within the year preceding, twice previously

convicted of the offence of drunkenness, namely, on June 9, 1881, and on June 27, 1881. It appeared that the prior conviction of June 27, 1881, was upon a complaint alleging two prior convictions within a year, namely, on April 12, 1881, and on June 9, 1881.

The defendant contends that the conviction of June 9, 1881, having been relied upon by the government to aggravate the offence committed on June 27, cannot be again relied on to aggravate the offence of April 16, 1882. But this is founded upon a misconception of the purpose and effect of the statute. If a man is guilty of drunkenness three or four or five times within a year, each offence is a distinct offence.

The third or fourth or fifth is not the less an offence because it is aggravated by the fact that he has been twice within the year convicted of a like offence. The first or the second is still a distinct offence of drunkenness, although it has been relied on to aggravate the third. The effect of thus using it is not to pardon or condone or merge the offence. It is thus used merely as a part of the description and character of the third offence, and may be again relied on as a part of the description of a fourth or fifth offence committed within the year. The object of the statute is to prevent the repeated commission of similar offences by imposing severer penalties for each successive violation of law, and thus to save persons from becoming old and hardened offenders. This object would be thwarted if the fourth or fifth offence must be regarded as a light offence, merely because the third is a graver offence aggravated by two prior convictions within a year.

The case of the defendant is within the letter and the spirit of the statute; and the ruling of the Superior Court, "that the record of said convictions of June 9, 1881, and June 27, 1881, the defendant admitting that he was the person referred to in said records, would justify a finding that the defendant had been twice convicted of the crime of drunkenness within twelve months preceding this complaint," was correct. *Plumbly v. Commonwealth*, 2 Met. 413. *Commonwealth v. Daley*, 4 Gray, 209.

It is stated in the bill of exceptions, that "the only evidence of drunkenness in this case was that the defendant was found in

the streets behaving in a drunken manner, staggering, and with a large crowd around him, and that his breath smelled of liquor." This cannot be true, because it was also in evidence that he had been twice within a year convicted of drunkenness by the voluntary use of intoxicating liquor upon his pleas of guilty. Besides this, the details and particulars of his behavior, which is described generally by the words "behaving in a drunken manner," must have been before the jury. The defendant asked the judge to rule that there was no evidence that the drunkenness was caused by the voluntary use of intoxicating liquor. The judge rightly refused this ruling. It is true that a man may be made drunk by having liquor forced upon him without his consent, in which case he would not be liable to punishment. If nothing whatever appeared in a case except that the defendant was drunk, probably a conviction could not be justified.

But it usually happens, as in this case, that the jury are furnished with evidence of surrounding circumstances, such as the defendant's character, conduct and behavior, which bears upon the question whether he has been drugged or is voluntarily drunk. In such cases, it is for the jury, judging of all the evidence in the light of human experience, to determine whether it is proved that the drunkenness was voluntary. In this case, the judge rightly left it to the jury to decide whether, upon all the evidence before them, uncontrolled and unexplained, the defendant was guilty of the crime charged.

Exceptions overruled.

GEORGE A. WASHBURN *vs.* JAMES J. WALWORTH & others.

Bristol. Oct. 26. — Nov. 7, 1882. LORD & C. ALLEN, JJ., absent.

A partner, who retires from the partnership before the first day of May, and thereafter takes no part in the management of its affairs, and retains no interest in its property, is not liable, under the Gen. Sts. c. 11, § 15, for a tax assessed on that day upon the personal property of the partnership; and the fact that no notice was given by the retiring partner of the dissolution of the partnership does not affect his liability.

In an action for taxes assessed by a city upon the personal property of a partnership, evidence that the defendant had retired from the firm before the tax was assessed, and thereafter retained no interest in the firm or in the property taxed, is admissible under a general denial in the answer.

MORTON, C. J. This is an action brought by the collector of taxes of the city of Taunton, against the defendants as copartners under the style of the Dighton Tube Works, to recover the taxes upon personal property assessed to the Dighton Tube Works for the years 1875 and 1876. The defendants Gavitt and Crosby were defaulted, and the other four defend the suit. It appeared at the trial, that all the defendants were in 1874 copartners under the style of the Dighton Tube Works, carrying on business in Taunton, and paid the tax assessed upon the partnership in that year. On April 21, 1875, the four defendants who defend the suit sold and transferred all their interest in the partnership to Gavitt and Crosby, who continued to carry on the business under the same name. The said four defendants then withdrew from the firm, and thereafter took no part in the management of its affairs, and had no interest in its property.

This statement of the case shows that they are not liable for the taxes assessed to the firm on May 1, 1875, or afterwards. By the statutes, partners in business may be jointly taxed, under their partnership name, in the place where their business is carried on, for all the personal property employed in such business, except ships or vessels; and, when so jointly taxed, each partner shall be liable for the whole tax. Gen. Sts. c. 11, § 15. Pub. Sts. c. 11, § 24. Under these provisions, it is clear that, when a city or town assesses a tax upon property of a partnership under the partnership name, only

those persons are liable for the tax who are partners and owners of the property on the first day of May, when the tax is assessed. No other persons fall within the terms of the statute.

The plaintiff contends that, as the retiring partners neglected, when they withdrew from the firm, to give notice to the city of Taunton of the dissolution, they continued liable as partners for the taxes assessed after the dissolution. But the statute does not so provide, and we know of no principle upon which this can be held to be the law.

It is true that, in many cases, where a partnership is dissolved by the voluntary act of the parties, the retiring partners, if they neglect to give notice of the dissolution, may be liable to those subsequently dealing with the firm in ignorance of the dissolution. This rests upon the principle, that the retiring partners are guilty of negligence in not giving notice, and that they thus induce persons dealing with the firm to infer that the partnership continues, and to give faith and credit to the firm in consequence of such belief. But this principle is not applicable in the case at bar. The defendants owed no duty to the city to give it notice of the dissolution. A tax is not a contract, but an arbitrary imposition. The city had no dealings with the firm, so that the partners were required in the exercise of good faith to notify it of any change. It gave no credit to the firm, but simply levied a tax upon the firm's property. There was no act, of commission or omission, of the partners which affected its action, or which could operate to estop the retiring partners to deny that they were members of the firm.

It is also clear that this defence was open under the answer. The dissolution of the old firm is not matter in discharge or avoidance of the plaintiff's cause of action. He was required to allege and prove, as one of the facts necessary to make out his case, that the several defendants were partners in the firm when the tax was assessed. Proof of a dissolution before that time, and that the retiring partners retained no interest in the firm or the property taxed, directly met and controlled this allegation, and was therefore admissible under a general denial. *Hill v. Crompton*, 119 Mass. 376.

We are therefore of opinion, that, upon the facts proved, the Superior Court rightly ruled that the plaintiff was not entitled to maintain this action against the retiring partners.

Exceptions overruled.

C. A. Reed & J. H. Dean, for the plaintiff.

G. E. Williams & L. L. Scaife, for the defendants.

EDWARD KENNEY vs. EDWARD P. SHAW.

Essex. November 9. — 10, 1882. LORD & C. ALLEN, JJ., absent.

A workman, engaged in blasting at a quarry, assumes the risks of his employment, and cannot maintain an action against his employer for an injury sustained in consequence of his obeying an order of another workman who superintends the blasting.

TORT, for personal injuries received by the plaintiff while in the defendant's employ. Answer, a general denial. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions, in substance as follows:

The plaintiff introduced evidence tending to show that, on August 2, 1881, the defendant, who was engaged in building the jetties at the mouth of the Merrimac River, employed the plaintiff to work in his quarry, where stone was got out for said jetties; that the plaintiff's business was to hold or to strike a drill in the sinking of holes in rocks preparatory to the blasting of the same; that the defendant also had in his employ one Manning, who had charge of the blasting, directing the men where to strike the holes and the depth to which they were to be sunk, and who loaded the holes so sunk in the rocks with dualin and powder for blasting, exploded the blasting material when the holes were loaded, and notified the workmen when to leave the rocks to be so blasted and when to return to work after the blasts were made; that the plaintiff was not familiar with the blasting of rocks, and had no knowledge of, or skill in, the business of blasting rocks, except to strike or hold the drill in the sinking of holes; but he knew that the working in

a quarry, where blasting was being carried on, was a dangerous business.

It appeared that the plaintiff had been at work at the ledge about three weeks, and had seen what the process of loading was, namely, the placing of some sort of blasting powder in the bottom of the holes, and of a quantity of gunpowder in a cartridge upon it; that the plaintiff, on August 29, 1881, sunk two holes in some rocks in the regular course of his employment, and Manning loaded the same with dualin and gunpowder for the purpose of blasting the rocks, and, after so loading, fired the same, only one blast doing any execution; that, soon after the discharge of the loading doing no execution, Manning ordered the plaintiff to sink said hole two inches deeper, when the loading had not all been blown out, without notifying him that any blasting material was still in the hole; that the plaintiff, in pursuance of said order, put an iron drill into the hole, without any knowledge that any blasting material was in the hole, and not noticing that the drill did not go as far as the hole had been drilled; and that one of the employees of the defendant, at the request of the plaintiff, struck the drill, which caused the blasting material in the hole to explode, and the plaintiff received the injuries complained of.

There was no evidence that the failure of the gunpowder to explode or ignite dualin at the bottom of a drill hole had ever happened before, either at this place or elsewhere.

The judge ruled, at the defendant's request, that there was no evidence tending to show any liability on the part of the defendant for the injury sustained by the plaintiff; and ordered a verdict for the defendant. The plaintiff alleged exceptions.

C. P. Thompson, for the plaintiff.

H. N. Shepard, for the defendant.

BY THE COURT. There was no evidence to show any liability of the defendant for the injury which the plaintiff sustained. The injury was caused by one of the risks of the employment which the plaintiff assumed. *Exceptions overruled.*

MEMORANDUM.

On the tenth day of November 1882, the Honorable WALDO COLBURN, one of the Justices of the Superior Court, was appointed a justice of this court, in place of Mr. Justice ENDICOTT resigned, and took his seat upon the bench on the fourteenth day of the same month, at the term of the court then held at Boston in the county of Suffolk.

CHESTER C. CONANT & another *vs.* FREDERICK L. BURNHAM.

Franklin. Sept. 20. — Nov. 25, 1882. LORD, FIELD & COLBURN, JJ., absent.

A husband is liable for legal services rendered to his wife in successfully defending her against a complaint instituted against her by him for being a common drunkard.

A husband is not liable for legal services rendered his wife in instituting a complaint against him for an assault and battery upon her.

CONTRACT in three counts. The first count was for professional services rendered by the plaintiffs, as attorneys at law, to Kate A. Burnham, the defendant's wife, at her request, according to an account annexed, containing four items amounting to \$47; and alleged that the services were necessary. The second count alleged that the defendant committed a serious assault and battery upon the person of his wife, the said Kate A.; that she employed the plaintiffs, as attorneys at law, to make a complaint and to prosecute the defendant for said offence; that the plaintiffs made such complaint, upon which the defendant was convicted and sentenced; that for said services the defendant owed the plaintiffs the sum of seven dollars; that the services were rendered on or about October 3, 1881, and "were necessary for the safety and protection of the said Kate A.; this count being for the same cause of action as the first item in the first count." The third count alleged that, on October 3, 1881, the defendant made a complaint against his wife, the said Kate A., charging her with the offence of being a common drunkard,

before a trial justice; that she employed the plaintiffs as attorneys to conduct her defence upon the trial of said complaint; that they appeared and acted for her at the trial, and she was there convicted and sentenced to one year's imprisonment; that the plaintiffs entered an appeal for her to the Superior Court; and that the defendant owed the plaintiffs the sum of five dollars for the services so rendered; that in the Superior Court, on November 22, 1881, said appeal was tried, and said Kate A. was duly acquitted; that the plaintiffs made preparation for the trial, saw a large number of witnesses, took the deposition of a certain person, and procured the affidavit of a physician named, and did other acts to make ready the defence, and the defendant owed them the sum of ten dollars for said services; and that the plaintiffs tried the case in the Superior Court, wherein the said Kate A. was found not guilty, and the defendant owed them the sum of twenty-five dollars for services at said trial, "and for other services in said case not otherwise embraced in the foregoing items;" that "said services were so rendered by the plaintiff at the request of the said Kate A., and were necessary for the safety and protection of the said Kate A. and for the vindication of her good name, this count being for the same cause of action as the second, third and fourth items in the first count."

In the Superior Court, the parties agreed that the statements set forth in the declaration might be taken to be true. Upon this agreed statement, the court ordered judgment for the plaintiffs; and the defendant appealed to this court.

C. C. Conant & S. D. Conant, pro se.

G. D. Williams, for the defendant.

C. ALLEN, J. The defence is put on the broad ground, that in this State counsel fees for legal services rendered to a wife at her request do not in any case fall within the class of necessities, for which the husband may be held liable. It has sometimes been thought possible to make an exact enumeration of all the kinds or classes of articles which can be included within the meaning of that term. See *Shelton v. Pendleton*, 18 Conn. 417, 423, and authorities there cited. But we do not think it desirable to attempt to prescribe a universal rule or formula for the specific determination of this question in every case. In a general way,

it may be said that whatever naturally and reasonably tends to relieve distress, or materially and in some essential particular to promote comfort, either of body or mind, may be deemed to be a necessary, for which a wife, under proper circumstances, may pledge her husband's credit. A somewhat broader declaration of the general principle is found in a recent English case, where Thesiger, L. J. said, that "the word 'necessary' in its legal sense, as applied to a wife, merely means something which it is reasonable that she should enjoy." *Ottaway v. Hamilton*, 3 C. P. D. 393, 401. And in this State it has been declared heretofore, that, "as a general rule, the term 'necessaries,' applied to a wife, is not confined to articles of food or clothing required to sustain life or preserve decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband." *Raynes v. Bennett*, 114 Mass. 424, 429.

Each case must be determined by its own circumstances. Approximations may sometimes be made, by holding that certain articles or services are to be deemed outside of any reasonable construction of the term. But legal services do not fall within such universal or general exclusion. There may be occasions when such services are absolutely essential for the relief of a wife's physical or mental distress. Suing out a writ of *habeas corpus* to deliver herself from unjust and illegal imprisonment, or to regain possession of her child, might, under peculiar circumstances, furnish illustrations of a strong necessity. Another illustration may be found in the circumstances of the present case. The husband had committed an assault and battery upon his wife, and had instituted against her a criminal prosecution, which, from her final acquittal, may now be assumed to have been perhaps without just foundation. What was she to do? Is it to be held that the woman, ignorant of legal rules and methods of proceeding, without money or friends, not only deprived of the protection and aid of her husband, but encountering his active hostility, was competent to defend herself properly on her trial before a jury? This would be equivalent to saying that the law considers the assistance of attorneys of no value. This would not be consistent with the provision of the Declaration of Rights, and of the statutes, giving to every person accused of crime the right to be heard in his defence by counsel.

Declaration of Rights, art. 12. Pub. Sts. c. 200, § 4. In an indictment for murder, counsel are assigned to the prisoner by the court, under the provisions of the Pub. Sts. c. 150, § 19, and are expected to serve without pay, if the prisoner cannot furnish compensation; and no such prisoner has gone undefended on this ground. There is no provision of statute for assigning counsel to one indicted for a less offence. But, if such assistance was of value to the defendant's wife, and was necessary to her, no artificial rule of law should be interposed to prevent her from obtaining it, in the same manner as the law allows her to obtain whatever else may be absolutely necessary, under such circumstances as may exist at the time. There is no hardship upon the husband, in this case, from the application of this rule; for by his own act he created the necessity which she was under, and he made no provision for supplying it. The defendant's counsel concedes that the plaintiff's services were as a matter of fact necessary. Recent English decisions fully establish the doctrine, for that country, that legal services may fall within the class of necessities. *Ottaway v. Hamilton*, *ubi supra*. *Wilson v. Ford*, L. R. 3 Ex. 63. *Stocken v. Patrick*, 29 Law Times (N. S.) 507.

This court has heretofore held that a husband is not liable for legal services rendered to his wife in successfully defending her against a libel for divorce filed by him. *Coffin v. Dunham*, 8 Cush. 404. There are reasons peculiarly applicable, in this Commonwealth, to services in such proceedings, which do not apply to cases like the present.

Under the laws and customs of this State, we do not think that legal assistance was necessary for this woman in prosecuting her husband for an assault and battery upon her. The complaint in such case may be made orally to the magistrate, who will himself reduce it to writing, issue a warrant if it appears that an offence has been committed, and investigate the case. Pub. Sts. c. 212, §§ 15, 29. The agreement of the defendant, that the statements set forth in the declaration may be taken to be true, was probably not designed to extend to the averment that these services "were necessary for the safety and protection of the said Kate A." At any rate, to hold them to have been necessary would be to assume that the magistrate

would fail in his duty. The result is, that the charge of seven dollars for these services may be remitted; and, this being done, the entry, as to the rest of the plaintiff's claim, will be

Judgment affirmed.



ELIZA CORCORAN, administratrix, vs. BOSTON & ALBANY
RAILROAD COMPANY.

Hampden. Nov. 14. — 15, 1882. LORD, J., absent. DEVENS & W. ALLEN, JJ., did not sit.

An action cannot be maintained against a railroad corporation for personal injuries occasioned to a brakeman in its employ, by falling from a moving train, and resulting in death, if the evidence wholly fails to show how he fell, what he was doing at the time, whether his death was instantaneous, or whether he endured any conscious suffering before his death.

TORT, by the administratrix of George Corcoran, for personal injuries sustained by her intestate in his lifetime, while a brakeman upon a freight train of the defendant corporation. The declaration alleged that the injury was caused by the intestate being knocked from a ladder on the side of a car, (upon which it was his duty to go while the train was passing through a rocky cut,) by an accumulation of ice and snow, which the defendant had negligently suffered to be there.

At the trial in the Superior Court, before *Putnam, J.*, there was evidence tending to show the following facts:

At a point on the defendant's road was a cut, the sides of which were of rock, and, on the side where it was contended the intestate was injured, the rail was five or six feet from the face of the rock. In the winter season, ice formed on the sides of the cut, caused by the dripping of water through and down the face of the rock, several inches sometimes forming in a single night. On the night when the accident happened, ice projected about two feet from the face of the rock, and, near the centre of the cut, the space between the rail and the face of the ice was from twenty-eight inches, at a point one foot above the track, to thirty-five inches at a point four feet above the track. A freight

car projects twenty-four inches beyond the rail, and a man on the ladder on the side of the car would project from one to two feet from the side of the car. The accident happened on the night of February 5, 1881, which was a very cold night.

While the train was going through the cut, at the rate of fifteen miles an hour, the intestate was seen to go down from the top of a house car to a platform car to set the brake on that car, and this was the last seen of him alive. The brake on the platform car was afterwards found to be set. His next duty was to ascend a ladder on the side of a house car, in the rear of the platform car, to set the brake on that car. His lighted lantern was seen on the top of this car, and the lantern was afterwards found there.

The train of cars was moving towards the east, and the greater part of the intestate's dead body was found a quarter of a mile to the eastward of the centre of the cut. An impression was found in the snow by the side of the track just east of the place where the ice on the side of the cut came nearest to the track, indicating that something heavy had fallen there. Two hundred feet east of this point, the first blood spots on the snow were found, and portions of the body were found between the place where the blood spots were and the place where the rest of the body was found. Between these places there were indications on the rails of the track showing that the wheels of the cars had passed over portions of the body.

Some of the fatal injuries to the body would not have caused death at once, while others would have done so.

It was the duty of the section men employed by the defendant to see that the cut was kept in a proper and safe condition, and free from ice.

At the request of the defendant, the judge ruled that the plaintiff was not entitled to maintain the action, ordered a verdict for the defendant, and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered on the verdict. If the case should have been submitted to the jury, the verdict was to be set aside, and a new trial granted.

E. H. Lathrop, for the plaintiff.

A. L. Soule, for the defendant.

BY THE COURT. The burden of proof is upon the plaintiff to show that her intestate was using due care when the accident happened, and that his death was not instantaneous, so that a right of action existed in him which would survive to her. It is impossible to tell from the evidence how the intestate fell from the cars, what he was doing at the time, whether his death was instantaneous, or whether he endured any conscious suffering before his death. These questions are left to conjecture. The evidence would not justify the jury in finding that the plaintiff had sustained the burden of proof which was upon her as to these points, and the Superior Court therefore rightly directed a verdict for the defendant. *Moran v. Hollings*, 125 Mass. 93, and cases cited.

Judgment on the verdict.

HALSEY W. CURTIS vs. CYRUS A. CLARK.

Hampden. Sept. 26. — Nov. 25, 1882. LORD, FIELD & COLBURN, JJ.,
absent.

A. sold to B. certain personal property and real estate, taking in payment an amount in money greater than the value of the personal estate, and a promissory note for the residue. The deed of the property was defective as to the real estate, because not under seal. *Held*, that A. could not maintain an action against B. on the promissory note, although B. entered into possession of the real estate, and remained in possession until after the action was brought upon the note.

CONTRACT upon a promissory note for \$500, dated July 13, 1875, payable on April 1, 1876, to the order of the plaintiff, and signed by the defendant. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon the following agreed facts:

The promissory note declared on was executed by the defendant, and the consideration thereof was part of the price of certain real estate in this Commonwealth, and personal property conveyed by the plaintiff to the defendant, by a writing in the form of a deed duly acknowledged, except that instead of a seal the letters "L. S." were upon it in the place where a seal is usually affixed to such an instrument. The defendant

entered into possession of the land described in said deed, and remained in occupation thereof for some years, and until after the commencement of this suit. The whole price of said real estate and personal property was \$2000, and the value of the personal property was \$100; \$1000 was paid in cash, and the balance by two promissory notes of \$500 each, of which the note in suit is one.

A mortgage upon said real estate was given by the defendant to the plaintiff to secure said notes, which was defective as regards the seal to the same extent as the deed to the defendant. The plaintiff, claiming under said mortgage, has entered into possession of said real estate. The plaintiff has also redeemed said premises from a sale for taxes, and has taken a quitclaim deed from the purchaser at said sale.

C. L. Long, for the plaintiff.

J. M. Ross, for the defendant.

C. ALLEN, J. The statement of facts in this case is rather meagre, but we think it sufficiently appears that the plaintiff was to convey to the defendant a good title to the land, by a good and sufficient deed, at the time of receiving the cash and notes for the price; that he failed to do so, and delivered, instead of a deed, a paper which conveyed no title; that he has never tendered or offered to execute and deliver a valid deed; and that the defendant did not intend to accept an invalid deed in lieu of a valid one. For the personal property, the plaintiff was more than paid, in cash. The notes, therefore, are to be treated as applicable only to the real estate. The consideration of the note in suit was a part of the price of the real estate. Through the plaintiff's fault, no title was conveyed. The defendant has never sought by bill in equity to compel the plaintiff to make a title to him. The plaintiff has never offered to make such title to the defendant, though it was in his power to do so. Under these circumstances, both parties are to be treated as having rescinded the bargain, so far as the real estate is concerned, and the consideration of the note entirely fails. *Rice v. Goddard*, 14 Pick. 293. *Trask v. Vinson*, 20 Pick. 105, 110. *Basford v. Pearson*, 9 Allen, 387. The fact that the defendant was in possession for several years does not help the plaintiff. The consideration of the note was not for use and occupation, but

for a title. No case is cited, or has been found, which holds that a vendor of land, who has agreed to give a good and valid deed at the time of receiving a promissory note for the price, and who has received the note, but through his own fault has failed to give or to offer to give such deed, can recover on the note; even though the vendee has for a time been in the use and occupation of the land. See Sugd. Vend. & P. 240; Dart Vend. & P. (5th. ed.) 961, 962; Bayley on Bills, 507; *Bank of Columbia v. Hagner*, 1 Pet. 455.

Judgment for the defendant affirmed.

HEMAN SMITH, trustee, vs. ALEXANDER BURGESS.

Hampden. Sept. 27. — Nov. 28, 1882. LORD, FIELD & COLBURN, JJ.,
absent.

A. lent money held in trust by him for C., and took therefor a note and a mortgage of land, the note being payable to A. personally, and the mortgage, which was recorded, reciting that the consideration was paid by A., "trustee of C.," and conveying the land to A., "trustee as aforesaid." A. afterwards borrowed money of B. and assigned the note and mortgage to him as security therefor; and the assignment of the mortgage was recorded. The note was delivered, but not indorsed, to B.; and the words "trustee of C." were erased by A. before the mortgage was delivered to B. B. did not examine the record, and his attention was not attracted to the words "trustee as aforesaid," and he had no actual knowledge of their existence, or of the fact that both note and mortgage represented trust funds held by A., but he knew that the money lent to A. was for his personal use. *Held*, that B. was charged with constructive notice of the trust under which A. held the note and mortgage.

A person who accepts an assignment of a mortgage, without reading the mortgage, is conclusively presumed to know its contents, and is bound by them.

BILL IN EQUITY by the trustee for Clara M. Pyne, under the will of John H. Lucas, to compel the defendant to surrender, for the benefit of the trust estate, a note and mortgage given by Richard W. Gardner to James Lewis, and by him assigned to the defendant. Hearing before *W. Allen, J.*, who reported, for the consideration of the full court, the following case:

Lewis was the predecessor of the plaintiff as trustee, and, while trustee, lent to Gardner \$2000 belonging to the trust estate, and took therefor the note and mortgage in question, dated

April 23, 1874, the note payable in five years from date to the order of James Lewis. By the mortgage, Gardner, "in consideration of \$2000 paid by James Lewis, trustee of Clara M. Pyne," conveyed certain real estate in Springfield to "the said Lewis, trustee as aforesaid." The note was described in the condition of the mortgage as "payable to said James Lewis." The mortgage was recorded on June 4, 1874.

On August 4, 1874, Lewis applied to the defendant for a loan of \$1000, and offered the note and mortgage as security. The defendant filled out a blank form of assignment attached to the mortgage, which was executed and delivered by Lewis, with the note and mortgage, and his note for \$1000, payable to the defendant, to the latter, who thereupon paid to Lewis the \$1000. The assignment of the mortgage was recorded on January 3, 1876, and was absolute in its terms, and by it Lewis, "the grantee mentioned in the deed of mortgage dated April 23, 1874, and recorded," etc., sold, assigned and transferred to the defendant "the aforesaid deed of mortgage, and all my right, title and interest in and to the real estate therein conveyed, and the note therein described." The note was not indorsed by Lewis. When Lewis produced the mortgage to the defendant, it was apparently in the same condition as when executed, and had upon it the certificate of the register that it had been recorded; but it did not then contain the words "trustee of Clara M. Pyne," those words having been erased by Lewis, after the mortgage was recorded. The defendant did not examine the record, but relied upon the paper shown him as the original mortgage. He had no notice of the erasure, and his attention was not attracted to the words "trustee as aforesaid," following the name of Lewis, as grantee, in the mortgage. He knew that the money was for the use of Lewis, and paid it in good faith, relying on the security of the note and mortgage, and without notice of the trust, unless such notice is to be inferred from the words "trustee as aforesaid," in the mortgage, or from the record of it.

E. B. Maynard, for the plaintiff.

G. Wells & E. P. Kendrick, for the defendant.

C. ALLEN, J. It has heretofore been held in this Commonwealth, that, where a mortgage was assigned to A. B., trustee, in consideration of money paid by him, trustee, and where the

mortgage note was also indorsed to him, trustee, a presumption was raised that he took the same in trust, so that his heirs at law could not convey a good title thereto without showing that in point of fact no trust existed. *Sturtevant v. Jaques*, 14 Allen, 523. It has also been held that, if a guardian of minor children uses his wards' money to buy land, and takes a deed acknowledging the receipt of the consideration paid by him as guardian, but running to himself, his heirs and assigns, without otherwise referring to his guardianship, this is sufficient to give notice to his creditors that the land is held by him in trust. *Bancroft v. Consen*, 13 Allen, 50. A similar doctrine was held, under somewhat different circumstances, in *Hayward v. Cain*, 110 Mass. 273. And in *Shaw v. Spencer*, 100 Mass. 382, it was held that a certificate of shares in a corporation, in the name of A. B. trustee, if pledged by him to secure his own debt, gives notice of the trust to the pledgee. This case was much considered, and elaborately discussed at the bar and in the opinion of the court; it was reaffirmed in *Fisher v. Brown*, 104 Mass. 259; and it has been approved by the Supreme Court of the United States, in *Duncan v. Jaudon*, 15 Wall. 165, 175.

The defendant in the present case made a loan of money to James Lewis, knowing that the same was for the personal use of Lewis, and took as security therefor an assignment of the note and mortgage in question. The note ran to Lewis personally, and was by him delivered, though not indorsed, to the defendant. The mortgage ran to Lewis, "trustee as aforesaid," and the words "trustee for Clara M. Pyne," which originally followed the recital of the payment of the consideration, had been erased. This mortgage was assigned by Lewis personally, without mentioning his capacity as trustee; the assignment being drawn by the defendant upon a form attached to the mortgage itself. Although the defendant had the mortgage in his hands, and although it was taken by him as security, his attention was not attracted to the words "trustee as aforesaid," and he had no actual knowledge of their existence, or of the fact that both note and mortgage represented trust funds held by Lewis.

It cannot be doubted that, if the defendant had read the mortgage, and become aware of the fact that it ran to Lewis as "trustee as aforesaid," he would have pursued the inquiry as to

the meaning of those words. Looking to see what was referred to in the few lines which preceded them, he would probably have discovered the erasure. If he did not, he would have been likely, and also bound, to inquire if Lewis held the mortgage as trustee, and trustee for whom. He knew that the mortgage was given as security for the note, and the mortgage itself showed the same fact. The mortgage and note had reference to one transaction; and, if Lewis held one of them as trustee, there was reason to suppose that he so held the other also. If the defendant had been actually aware that the mortgage ran to Lewis as trustee, the omission of the word "trustee" in the note would not excuse him from the duty of inquiry imposed by the existence of that word in the mortgage. It is not a question from how many sources he would get his information of the trust, but whether he got it from any source.

Nor can we think that the omission of the word "trustee" in the note excused the defendant from the duty of examining the mortgage, to see the nature of the title he was taking. The mortgage was a constituent part of his security. It was not only a link in the title which he was taking, but it was itself produced and delivered to him as representing the title. The rule is general, is stated in various text-books, and is recognized in a multitude of cases, that, where a purchaser has notice of a deed, he is bound by all its contents. 2 Sugd. Vend. & P. 775. 4 Kent Com. 179. 1 Story Eq. Jur. § 400. Kerr on Fraud & Mistake (Am. ed.) 240, 241. 2 Pomeroy Eq. §§ 626-628. A similar rule has been applied in this State to persons who enter into and accept written contracts. *Grace v. Adams*, 100 Mass. 505. *Monitor Ins. Co. v. Buffum*, 115 Mass. 343. The truth appears to be, that the defendant accepted the mortgage without taking pains to read it. If he had read it, he would have discovered all that was necessary for his protection. The law holds him to the legal duty of reading it, and of informing himself of all it contains. He must be conclusively presumed to have performed this duty, and cannot be heard to say that he did not. His legal position is the same as if he had actually read it.

Finally, it is urged that the words "trustee as aforesaid" were written obscurely, and in a manner likely to escape observation; and the original mortgage has been submitted to us. It is not

suggested that the mortgage was drawn with a view to enable a fraud to be practised upon an unwary purchaser, nor do we find anything in its appearance to warrant such a suggestion. The handwriting is not very plain; but the words in question are not especially illegible. We should be slow to declare that a general obscurity in the handwriting of a mortgage would entitle anybody to buy it without taking pains to ascertain what the hieroglyphics might mean; but in the present case we find no such obscurity as to make a reader likely to overlook those words.

Decree for the plaintiff.

EXPERIENCE C. SIBLEY, administratrix, *vs.* QUINSIGAMOND
NATIONAL BANK & others.

Worcester. Oct. 8, 1880; Jan. 27. — Nov. 27, 1882. LORD, J., absent.

A., who owned stock in a national bank, transferred it to B. to hold in trust for him, and a new certificate was issued to B., in which the stock was declared to be transferable only on the books of the bank by him or his attorney, on the surrender of the certificate. The bank had no notice of the trust. B. indorsed upon his certificate an assignment to A. and delivered it to him. The stock continued to stand in the name of B. on the books of the bank, and he voted on it and received the dividends thereon, which he paid to A., and acted as shareholder. B. became insolvent, and an assignee in insolvency was appointed. The stock had been previously attached by a creditor of B., and an order was afterwards made, on the application of the assignee and the creditor, under the Gen. Sts. c. 118, § 45, that the lien created by the attachment should continue. A. afterwards offered to surrender the certificate to the bank, and demanded a transfer of the stock to himself. The by-laws of the bank provided that the stock should be assignable only on its books, and that a transfer-book should be kept in which all assignments and transfers of stock should be made. *Held*, on a bill in equity by A. against the bank to compel a transfer of the stock, that the stock did not pass to the assignee in insolvency of B.; that the attachment was dissolved; and that A. was entitled to the transfer.

BILL IN EQUITY, filed October 7, 1879, against the Quinsigamond National Bank, a corporation having its place of business in the city of Worcester in this Commonwealth, Daniel A. Hawkins, and Charles A. Hill, the assignee in insolvency of the estate of said Hawkins, to compel the transfer to the plaintiff of seven shares of the capital stock of the defendant bank.

The case was heard upon the pleadings and agreed facts, before a single justice of this court, who ordered a decree to be entered for the defendants. The plaintiff appealed to the full court. The facts appear in the opinion.

The case was argued at the bar in October 1880, by *F. T. Blackmer*, for the plaintiff, and by *E. B. Stoddard*, for the defendants; and was afterwards submitted on briefs by the same counsel.

W. ALLEN, J. The plaintiff, as administratrix of Rhoda Wheelock, seeks a transfer to herself of certain stock of a national bank, standing on its books in the name of Daniel A. Hawkins. It appears that the stock was purchased by Mrs. Wheelock in 1865, and the certificate issued to her; that in 1866 she transferred it to Hawkins, and a new certificate was issued to him, and the stock has ever since stood in his name on the books of the bank, and he has voted on it at meetings of the stockholders, and received the dividends from the bank, and acted as shareholder. The stock was transferred by Mrs. Wheelock to Hawkins solely that he might hold it in trust for her; and, when he received the certificate from the bank, he indorsed upon it an assignment to Mrs. Wheelock, and delivered the certificate and assignment to her, and she has held them ever since; he received the dividends for her, and paid them over to her. The bank had no notice of the trust.

The by-laws of the bank provide that the stock shall be assignable only on the books of the bank, and that a transfer-book shall be kept in which all assignments and transfers of stock shall be made; and in the certificate to Hawkins the stock is declared to be transferable only on the books of the bank by him or his attorney, on the surrender of the certificate. The plaintiff has offered to surrender the certificate, and has demanded a transfer of the stock to herself as the administratrix of Mrs. Wheelock.

The defendant Hill contends that he is entitled to the stock, as assignee of the estate of Hawkins, under the insolvent laws of this Commonwealth; and it appears that, upon the petition of Hawkins, insolvency proceedings were instituted, and his estate was duly assigned to the defendant Hill, before the demand made by the plaintiff upon the bank, and before the bank had

notice of the trust. The question presented is, whether the stock passed to the assignee by virtue of the assignment.

As an assignment under the insolvent laws operates by force of the statute, and not as a conveyance from the debtor, the terms of the statute, as applied to the subject matter, must determine what will pass by the assignment. The language of the statute is, "The assignment shall vest in the assignee all the property of the debtor real and personal which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him." Gen. Sts. c. 118, § 44. Property held in trust by a debtor is not property of his which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him. There is no provision in the insolvent law that property held in trust by the debtor shall not pass by the assignment, and there is no occasion for such a provision. Such property is not the property of the debtor within the meaning of the act, and does not come within its provisions as property which will pass by the assignment. *Holmes v. Winchester*, ante, 140. *Chace v. Chapin*, 130 Mass. 128. *Hunnewell v. Lane*, 11 Met. 163. To enable the defendant to hold the stock in question as property of Hawkins, which could be taken on execution against him, it must be brought within some exception to the general rule of the common law, either by the effect of some statute, or by some application of the law of estoppel.

It is contended by the defendant, that, by force of statute provisions, national bank stock is deemed to belong to the person in whose name it stands on the books of the bank, and is liable to be taken on execution against him as his property, although he may have no beneficial interest in it, and may hold it as a trustee. Stock in corporations cannot be taken on execution, except as authorized by statute, and the statutes of this Commonwealth have made property of this nature liable to be so taken. The Gen. Sts. c. 133, § 43, provide that "the share or interest of a stockholder in any corporation established under the authority of this State, may be taken on execution and sold as herein-after provided." The St. of 1870, c. 291, § 1, provides that "the shares or interest of a stockholder in any corporation organized under the laws of the United States, and located or

having a general office in this State, may be attached on mesne process and taken on execution in the same manner as the shares or interest of a stockholder in corporations organized under the laws of this State, may be attached and taken on execution." These statutes do not define what shall be an attachable interest in stock, but leave that to be determined by the common law, or by some other statute. *Boston Music Hall v. Cory*, 129 Mass. 485.

At common law, property held in trust cannot be taken on execution as the property of the trustee, and there is no statute of this Commonwealth which relates to the subject. The defendant bank is organized under an act of Congress, and the question then is, whether there is any statute of the United States which makes the stock in a national bank liable to be taken on execution against the person in whose name it stands on the books of the bank, although he never had any beneficial interest in it, and has given a written assignment of it to a person for whom he holds it in trust. The U. S. Rev. Sts. § 915, which give like remedies against the property of a defendant, by attachment or execution, as are provided by the laws of the State, do not affect the question of what shall be competent evidence of the ownership of stock in national banks. The only statutes which bear upon that are the provisions of the U. S. Rev. Sts. which provide, in § 5139, that "the capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." § 5136 authorizes the association by its directors to make by-laws, not inconsistent with law, regulating the manner in which its stock shall be transferred. § 5210 requires that a list of the names and residences of the shareholders, and the number of shares held by each, shall be kept in the office of the association, which shall be subject to the inspection of the shareholders and creditors of the association, and State officers authorized to assess taxes. § 5151 makes shareholders individually liable for the debts of the association, to a limited amount. But for these provisions and the by-laws enacted in pursuance of them, the assignment in the case at bar would have transferred the legal

interest in the stock to Mrs. Wheelock, and made her the shareholder instead of Hawkins. By the effect of the statute, the legal title is in him, and he is the legal shareholder. The statute provides for transfers of stock, and concerns only the legal status of the shareholder. It does not require that the shareholder shall be deemed to be the beneficial owner of the stock, nor prescribe what shall be competent evidence to prove that he holds it in trust. Although the act makes provisions concerning stock held in trust (§ 5152), yet it does not prescribe how a trust shall be created, or proved, but leaves that and the rights of the *cestui que trust* unaffected by its provisions. If it contained the provision common in registry acts, that an assignment in any other than the prescribed mode should be void against all persons except the assignor and those having notice, or like that in the railroad law of this State, that a transfer not recorded as prescribed shall be void against all persons other than the grantors or their representatives; Pub. Sts. c. 112, § 56; or that in the general corporation law of this State, that no assignment shall affect the rights of an attaching creditor unless recorded as prescribed; Pub. Sts. c. 105, § 24; or any provision prescribing the manner in which a trust should be created or proved, — a different question would be presented.

It is argued that, by force of the provisions of the statute, the equitable interest of a purchaser for value, who should hold an assignment without a transfer, would not avail against an attaching creditor of the assignor; and that Mrs. Wheelock, having but an equitable interest, stands in the position of such a purchaser. There are two answers to this argument: first, Mrs. Wheelock does not stand in the position of a purchaser from Hawkins. The interest she has was never his; the assignment was but the declaration of an existing trust. If his creditors take all the right that he ever had in the stock, they will not take the beneficial interest. What they seek to take is what he never had, and what he never could have sold or assigned to Mrs. Wheelock or to them. The other answer is, that, if the equitable interest had once belonged to Hawkins, and Mrs. Wheelock held it by assignment from him, it would still prevail against his creditors. This is not vital to the decision of the case, but it was so prominently presented in the argument as

to require some notice, although an extended discussion of it is not proposed. It depends upon the construction of the statute of the United States before referred to. Is it the intent of the statute that equitable interests, acquired from the shareholder, shall be postponed to the rights of his creditors? This must be determined by the statute itself, and the construction given to it by the Supreme Court of the United States, so far as it has been construed by that court. *Black v. Zacharie*, 3 How. 483, construed a provision, that no transfers should be valid or effectual until recorded in a book kept for that purpose, as designed for the security of the bank itself, and of third persons taking without notice of any prior equitable transfer, and as relating to the legal title, and not to any equitable interest subordinate to that title. See also *Bank v. Lanier*, 11 Wall. 369; *National Bank v. Watson*, 105 U. S. 217; *Johnston v. Laflin*, 103 U. S. 800. The provision in the bank act is, that the stock shall be transferable on the books of the bank in such manner as may be prescribed by its by-laws. The by-law which provides that the stock shall be transferable only on the books of the bank, does not affect the construction of the act. The case of *Black v. Zacharie* seems decisive of the question under consideration, for, although it does not decide that an equitable interest derived from the shareholder can be set up against an attaching creditor without notice, but leaves that question, which was not before the court, unconsidered, it does expressly decide that a purchaser with notice cannot hold against the beneficial interest, and that the right of a purchaser without notice is left by the statute to be determined by the common law. See *Dickinson v. Central National Bank*, 129 Mass. 279.

The case of *Fisher v. Essex Bank*, 5 Gray, 873, affirmed in *Blanchard v. Dedham Gas Light Co.* 12 Gray, 213, has been cited as decisive of the question in this State. If the statute under consideration were part of the legislation of this Commonwealth, that case would be of great weight, and require very careful consideration; but the decision itself shows that it can be of but slight aid in determining the question under consideration. That question is, whether Congress intended, by the use of the words "shall be transferable on the books of the association," to make the stock liable to the creditors of an assignor of

it, as against an assignee to whom it had not been transferred of record. In *Fisher v. Essex Bank*, the question was, what was the intention of the Legislature of this State in using similar words; and the court found in the general spirit and scope of the legislation of this Commonwealth as to the attachment of shares in corporations, and in the particular legislation as to the attachment of bank shares, evidence that the Legislature intended by the words, "the stock of said bank shall be transferable only at its banking-house, and on its books," to enact that an assignment not so recorded should not be valid against the attaching creditors of the assignor. The effect of notice to an attaching creditor of an unrecorded transfer was not considered. Chief Justice Shaw said: "We are to take it in connection with all other existing laws." "It is obviously an object of great importance, that this large amount of property should be attachable and liable to be sold on execution. This has long been the policy of this State by earlier statutes, ultimately embraced in" the Rev. Sts. *cc.* 90 and 97. Those statutes not only made the shares of any stockholder liable to attachment, but made it the duty of the officer of any corporation keeping its records to give a certificate of the shares or interest of any stockholder on request of any officer having a writ of attachment or execution against such stockholder. Rev. Sts. *c.* 90, § 38; *c.* 97, § 39.

The statute under consideration for construction is a statute of the United States, in whose legislation no such policy existed, and whose legislative acts contained no provisions such as were referred to from the legislation of Massachusetts. The single consideration that the creditor of a shareholder in a national bank has no right of access to the books of the bank, and no means for obtaining knowledge of the transfers upon them, would show that the record was not intended for his benefit.

But, however it may be as to the assignment of the interest of a shareholder, there is nothing in the act which prohibits a trust in bank stock, or prescribes what shall be evidence of a trust, or empowers a creditor of a trustee to take from the true owner, for the debt of the trustee, an interest which was not derived from him, and which never belonged to him.

There is another ground upon which the defendant contends that this bill should be dismissed, even if the stock is not

property of Hawkins which could be taken on execution against him by his creditors generally, and would not pass to the assignee by the terms of the assignment alone. The Gen. Sts. c. 118, § 45, provide that, "If a debtor whose property is attached conveys before judgment and execution in the suit any part of such property, and subsequently thereto and before execution issues, proceedings are commenced by or against him as an insolvent debtor, or if a dissolution of an attachment under the preceding section might prevent the property attached from passing to the assignee, the judge before whom proceedings in insolvency are pending, or the court to which the process of attachment is returnable, may upon application made on or before the day of the third meeting of creditors by any person interested, and cause shown thereon, order the lien created by the attachment to continue," and provides further that the assignee may take charge of the action, and levy the execution, and that the amount recovered shall vest in him.

The stock in question was attached by a creditor of Hawkins a short time before the insolvency proceedings were commenced, and an order was made, on the application of the assignee and the attaching creditor, that the lien created by the attachment should continue, and the assignee claims the right to prosecute the action to execution. It is argued that the attachment and the order of the court give to the assignee, under this provision of the statute, whatever right to hold the stock the attaching creditor had, and that it can be determined, only by prosecuting the action in which the attachment was made, what that right was. If the right of the attaching creditor is no greater than that of the assignee, that is, if his right to attach the stock is based upon its being the property of Hawkins, and as such liable to his creditors, it is obvious that the order can have no effect, and is immaterial. We have already seen that there is no such right. Any other right which a creditor of Hawkins can have to attach the stock must be founded on estoppel, and be a personal right of the particular creditor, arising from the relation between him and Mrs. Wheelock, to take her property for the debt of Hawkins. This is not a right which can pass to the assignee, in any form, for the general benefit of the creditors. Whatever the ground of estoppel may be, the result would be

the same; it would be the property of Mrs. Wheelock which would be taken on execution against Hawkins, and not his property. Even if the attaching creditor could hold the position of a *bona fide* purchaser from the trustee, who has paid full consideration, he would be obliged to show that he had no notice of the trust, and his right arising from that would be a personal right of the particular creditor, a right by estoppel, and resting on the consideration that the owner was estopped from setting up her right against him. Whether even a purchaser could acquire from Hawkins a right to a transfer of the stock as against Mrs. Wheelock, may be doubted. Hawkins himself had no right to transfer it. Mrs. Wheelock was not only the beneficial owner, but she held the right to call upon the bank for a transfer of the stock from the name of Hawkins. The muniment of title, the certificate, with the right to surrender it and demand a transfer of the stock, was rightfully in her possession, and it is not clear that the bank could be required to transfer the stock, against her right, and contrary to the terms of the certificate, to one who had an equity not superior to him. *Bank v. Lanier, ubi supra*. Whether it should be said that Hawkins, not holding the certificate, could not give a right to a transfer, or that the fact that he did not hold the certificate would be notice of the trust, would be immaterial as regards the conclusion that he could give no title to a purchaser, as against Mrs. Wheelock. But, whatever the ground of estoppel upon which the attaching creditor might maintain his right to hold the stock, the assignee could not avail himself of that right. The property would not be that of the debtor, and could not pass to the assignee. This is the plain meaning of the statute, and is the construction given to it in *Audenried v. Betteley*, 5 Allen, 382, where it was held that property belonging to a third person, who had put it into the hands of the debtor for the purpose of giving him a false credit, did not pass by an assignment under the insolvent laws, although it might have been taken on execution against the debtor. Mr. Justice Hoar said: "The material question then is, whether this property can be regarded as 'the property of the debtor which might have been taken on execution upon a judgment against him,' within the meaning of the law. We are of opinion that it cannot." Referring to the analogy, which

had been pressed in the argument, to a conveyance in fraud of creditors, the opinion proceeds: "But the defect in this analogy is, that the property which a debtor attempts to convey in fraud of creditors has once been his. When the conveyance is avoided by a creditor, or by one succeeding to the rights of a creditor, in the mode prescribed by law, it is the property of the debtor which is to be dealt with. The assignee takes it as property which in contemplation of law has remained the debtor's property. But in the case at bar, the property never was the property of" the debtor. "The effect of an estoppel which existed as to rights of property between the debtor and third persons would pass to an assignee; but we do not think the insolvent law intended to pass rights of estoppel between the creditor and third persons." See also *Pratt v. Wheeler*, 6 Gray, 520.

And the personal right of one creditor cannot be diverted to the general benefit of all the creditors by an order that the lien created by the attachment should survive, and the assignee be admitted to prosecute the action. The statute in terms limits its application to the case of a "debtor whose property is attached," and applies to property of the debtor which would pass under the assignment, and was intended to enable the assignee to protect his right to such property against an intervening claim. If the property was such as would not pass by the assignment, the dissolution of the attachment could not "prevent" it from passing to the assignee. The meaning is plain, not only from the language and intent of the provision in the General Statutes, but from the previous acts. By the insolvent law of 1838, c. 163, § 5, the assignment conveyed to the assignee all the property of the debtor, although attached on mesne process, and dissolved all such attachments; and the same provision was continued in the General Statutes. "One leading object of this provision would seem to have been to give further effect to the great object of the insolvent law, the distribution of all the estate of the insolvent among his creditors *pro rata*. But it was found practically that such dissolution of an attachment might not effect that object, inasmuch as other liens might have attached to the property, subject only to the attachment, and, that being removed, the estate would, after all, be applied to the payment of individual creditors, instead of being secured

to the general fund for distribution. To obviate this evil, the St. of 1841, c. 124, § 5, was enacted." *Dewey, J., in McIntire v. Maynard*, 4 Gray, 429. See also *Purple v. Cooke*, 4 Gray, 120; *Grant v. Lyman*, 4 Met. 470, 474. The St. of 1841, c. 124, § 5, provided that, when it appeared to the judge of probate or master in chancery that a dissolution of any attachment would prevent the attached property from passing to the assignee, he might order that the attachment should survive, and the assignee might be permitted to prosecute the suit to final judgment and execution.

Under these statutes, it was decided that an attachment was dissolved unless the order was made that it survive. *Butterfield v. Converse*, 10 Cush. 317. And by the St. of 1855, c. 66, it was enacted that, when any debtor whose property was attached should after the attachment, and before judgment, make any conveyance of the property attached, and afterwards make application as an insolvent debtor, the attachment should not be dissolved. § 2 provided that the court might order the lien of the attachment to continue for the benefit of the creditors, and the assignee might prosecute the action. The St. of 1857, c. 247, provided that the attachment should be held to be dissolved by the assignment, unless the order that it should be continued for the benefit of the creditors should be obtained on or before the day of holding the third meeting of the creditors. It seems obvious that the St. of 1855, c. 66, was intended to supersede the St. of 1841, c. 124, § 5, and that the only material difference was that by the St. of 1855 the attachment in such case was not dissolved by the assignment. In enacting the General Statutes, the language of all these acts is incorporated into one section, Gen. Sts. c. 118, § 45, but obviously with no intention to change the law. See commissioners' notes to the General Statutes. But, apart from the history of the provision, a comparison of the Gen. Sts. c. 118, §§ 44, 45, indicates that it was not intended by § 45 to change the interest or property of a debtor which would pass to the assignee, or to enable the assignee to avail himself, for the benefit of the general creditors, of an attachment based, not upon the right of creditors in the property of the debtor, but upon a right which particular facts, personal to the attaching creditor, give to him in the property of another.

No question is made as to any interest in this suit of the attaching creditor. It appears that he joined with the assignee in procuring the order that the attachment should survive for the benefit of the assignee, and the attachment must be taken to be dissolved, unless the assignee has an interest sufficient to keep it alive. But, as we have seen, the assignee has no interest in the property, and the plaintiff is therefore entitled to a transfer of the stock.

Decree for the plaintiff.

LOUISA A. LOWE *vs.* INHABITANTS OF CLINTON.

Worcester. Oct. 4. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ., absent.

In an action for personal injuries occasioned by a defect in a highway, the notice given by the plaintiff under the St. of 1877, c. 284, stated the cause of the injury to be a defect in that portion of a certain street in the defendant town lying between the residences of two persons named, "to wit, a stump projecting four inches above the surface of the sidewalk on the east side of said street, between the residences aforesaid." The evidence showed that these houses were about fifty rods apart; that there were three other houses between them; that between two of the other houses there was a stump projecting two and a half inches above the surface of the street, the roots of which, extending easterly and westerly, were distinctly traceable by the eye; and that there was no other stump within the fifty rods. *Held*, that the notice sufficiently designated the place of the injury, within the statute.

TORT for personal injuries occasioned to the plaintiff by an alleged defect in a highway in the defendant town. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

On the night of May 9, 1879, the plaintiff, while walking on the sidewalk, in the exercise of due care, on the east side of North Main Street in the defendant town, struck her foot against a pine stump, and was thrown down and injured.

On the 16th of that month, she gave a notice in writing to the town, in which she stated that she, "while passing along and over that portion of North Main Street, in said Clinton, lying between the residences of C. C. Stone and Ethan A. Currier, was tripped up and thrown down, thereby causing a severe

injury to her right knee," "and that the cause of her falling was a defect or want of repair in said street, to wit, a stump projecting four inches above the surface of the sidewalk on the east side of said street, between the residences aforesaid."

The plaintiff's evidence tended to show that there was a sidewalk on the east side of the street, which extended all the way between the houses of Stone and Currier; that the sidewalk was of natural soil, not finished with granite curbing, and was in some places six or seven feet wide, and in other places of less width, but was a walk for foot-passengers in constant use for years; that the houses of Stone and Currier were fifty rods apart, and on opposite sides of the street; that between these houses, on the east side of the street and nearer to Stone's than to Currier's, were the houses of one Creamer and of one Powell, and that there was a third house nearer to Currier's; that in the sidewalk, two and a half feet from the fence, between the houses of Creamer and Powell, was a hard-pine stump, about the size of a broomstick on top, which projected two and a half inches above the surface of the walk, and from this stump roots extended both easterly and westerly, which were distinctly traceable by the eye, and were worn by footsteps, but which were not materially above the level of the sidewalk; and that this was the only stump within the fifty rods of walk between the houses named in the notice.

When the plaintiff's evidence was put in, the judge, at the request of the defendant, ruled that the notice was defective in not setting forth the place of the accident with sufficient certainty; and directed a verdict for the defendant. The plaintiff alleged exceptions.

W. S. B. Hopkins, (*J. Smith* with him,) for the plaintiff.

C. G. Stevens, for the defendant.

DEVENS, J. The notice under the St. of 1877, c. 234, attributes the cause of the plaintiff's injury to a defect or want of repair in that portion of North Main Street, in Clinton, lying between the residences of C. C. Stone and Ethan A. Currier, "to wit, a stump projecting four inches above the surface of the sidewalk on the east side of said street, between the residences aforesaid." These dwelling-houses were about fifty rods apart, and there were three other houses between them on the east

side of the street. That the stump might have been located more nearly and accurately is obvious; but the best and most careful description of the place and cause of injury is not required, if the purpose of the notice is fairly answered. It must have been contemplated that such notices would often be given by others than professional men, and, even when prepared with the aid of the latter, that such preparation must often be without entirely precise and definite information. It is sufficient if such a notice enables town officers to make proper investigation as to the liability of the town, by so informing them of the time, place and cause of the injury that they may do this. *Spellman v. Chicopee*, 131 Mass. 443.

When the town officers were informed, in the case at bar, that the place of the injury was between the two houses fifty rods apart, and that the cause was a stump on the easterly sidewalk between them, and the only evidence received tended to show that there was such a stump projecting two and a half inches above the surface, which must have been clearly visible, as even its roots, which extended easterly and westerly, were distinctly traceable by the eye, and that there was no other stump within the fifty rods, the notice should not have been ruled to be insufficient. If such were the facts, it enabled the authorities of the town to ascertain where the injury was alleged to have been received, and whether that which was claimed as its cause was really a defect. The object named as the cause of the injury located the precise spot where it was claimed to have occurred. The place would not perhaps be sufficiently designated when it might be anywhere within a space of even fifty rods; but when it is defined by a particular visible object, of which only one exists within the space, there is no embarrassment to those to whom the notice was given.

The defendant calls our attention to the cases of *Law v. Fairfield*, 46 Vt. 425, and *Butts v. Stowe*, 53 Vt. 600, decided under the statute of that State (St. of Vt. 1874, no. 51), which resembles in some respects our statute. In the latter of these cases, a notice described the place where the injury was received as "at a place a few rods below T. A. Straw's starch factory, and between that and the bend in the road at the point of rocks just below the factory." The distance was eleven rods, and the

notice was held not to be such as the law requires. But it is to be observed that the law of Vermont does not require the cause, but only the time and place, of the injury to be stated. The place might therefore have been anywhere within the eleven rods, and the statement of it was in no way aided, as here, by assigning a well-defined object, within the limits named, as the cause of the injury.

Exceptions sustained.

JOHN WELCH vs. INHABITANTS OF GARDNER.

Worcester. Oct. 6. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ., absent.

If a person, injured by a defect in a highway, does not give the notice required by the St. of 1877, c. 234, until after the expiration of the time therein prescribed, and, in an action by him against the town, the evidence is conflicting as to his physical and mental capacity to have given such notice earlier, it is for the jury to determine whether he was incapacitated from giving the notice until he did.

In an action for personal injuries occasioned by a defect in a highway, the notice given by the plaintiff, under the St. of 1877, c. 234, stated that, on a day named, he was injured upon a highway "leading from G. to T. called the Shoddy Road" by "a defect in said road near the blanket mills of F. & Co., the defect being large stones in said road or way, the said stones being at or near a sluiceway in said road." The evidence showed that the accident happened in the night-time; that the stones were set up as guards at the sluiceway, forming part of the culvert thrown across it, and bounded the travelled part of the way on either side; and that there were no other stones in the road for a distance of twenty rods on either side of the sluiceway. *Held*, that the notice sufficiently designated the time, place and cause of the injury, within the statute.

TORT for personal injuries occasioned to the plaintiff by a defect in a highway in the defendant town. At the trial in the Superior Court, before *Knowlton, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

W. S. B. Hopkins, for the defendant.

J. R. Thayer, for the plaintiff.

DEVENS, J. The notice required by the St. of 1877, c. 234, § 3, as preliminary to the commencement of an action for bodily injury or damage to property against a town, occasioned through

a defect or want of repair in a highway, which it is obliged by law to keep in repair, was not given within thirty days after the alleged injury, which was stated in the notice to have occurred on February 28, 1880. As § 4 of the same act provides "that if from physical or mental incapacity it be impossible for the person injured to give the notice within the time hereinbefore provided," he may give notice within ten days after such incapacity is removed, it was for the plaintiff to show that he was justified in the delay. For this purpose he introduced evidence of his mental and physical condition up to April 22, 1880, to the effect that he was unable to leave his bed until that time, was sick, nervous, dizzy and delirious, unable to think of anything, or to attend to any business. This evidence was supported by his own oath, and to some extent by that of his physician, and was controverted by evidence on behalf of the defendant. It was for the jury, under proper instructions, to determine as a question of fact whether the plaintiff was incapacitated from giving the notice, as he alleged, until April 22; and the evidence was legally sufficient to authorize them to find in favor of the plaintiff. *Mitchell v. Worcester*, 129 Mass. 525.

The notice described the place of the injury as being upon a highway "leading from Gardner to Templeton called the Shoddy Road," and the cause of injury as proceeding from "a defect in said road near the blanket mills of R. S. Frost & Co., the defect being large stones in said road or way, the said stones being at or near a sluiceway in said road." This notice the defendant contends to have been misleading and ambiguous, for the reason that the stones were set up as guards at the sluiceway, forming a part of the culvert thrown across it, and bounded the travelled part of the way on either side. There were no other stones in the road for a distance of twenty rods on either side of the sluiceway. There could be no doubt that these were the stones which the plaintiff alleged as the cause of his injury, and, although they are spoken of as large stones in the road, this is not an assertion that they are in the travelled part of the road; the description would equally apply to stones which too narrowly enclosed and bounded the road as intended to be travelled. Their location was made definite by the sluiceway, and by the further fact that there were no other stones in its vicinity.

The defendant contends that the real defect, if any defect there were, was that the travelled part of the road was made by these guard stones too narrow. But, however this may be, the cause of the injury was more properly described by attributing it to these stones than to the narrowness of the way produced by them.

The place was not alleged in the notice to be in Gardner, but, as there was a place answering the description there, in a notice to the authorities of Gardner, it could not be doubted that the place referred to was in that town. *Savory v. Haverhill*, 132 Mass. 324. Nor was it necessary to set forth in the notice the time of day when the injury took place.

We have heretofore said, through Mr. Justice Morton: "A notice given under the statute ought not to be construed with technical strictness. It is sufficient if it gives to the officers of the town information with substantial certainty as to the time and place of the injury, and as to the character and nature of the defect which caused it, so as to be of aid to them in investigating the question of the liability of the town." *Spellman v. Chicopee*, 131 Mass. 443. The notice in the present case has all these requisites.

Exceptions overruled.

CATHERINE McLANE vs. MARY CURRAN.

Plymouth. Oct. 17. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ., absent.

A guardian cannot, during the existence of that relation, maintain an action at law against his ward for necessities furnished to him, even if the guardian has no property of the ward in his possession.

CONTRACT, upon an account annexed, for necessities furnished by the plaintiff to the defendant. Writ dated April 29, 1880.

The case was referred to an auditor, who reported that the plaintiff was the mother of the defendant, who was a minor, and of whom the plaintiff was appointed guardian in March 1875, the defendant being then eleven years old; that the defendant's father died intestate on January 14, 1875, seised and possessed

of both real and personal property, and the plaintiff was appointed administratrix of his estate; that no inventory was filed by the plaintiff, either as administratrix or as guardian; that, in May 1880, the plaintiff filed an account as guardian of the defendant in the Probate Court, charging the defendant with precisely the same items and the same prices as were charged by the plaintiff in her account annexed to the writ in this action; and that such account was disallowed by the Probate Court. The auditor found that a certain sum was due from the defendant to the plaintiff, with interest from the date of the writ, if, as matter of law, the plaintiff was entitled to maintain her action, which question was reserved for the opinion of the court.

At the trial in the Superior Court, without a jury, *Brigham*, C. J., ruled that, upon the facts stated in the auditor's report, which was the only evidence offered, the action could not be maintained; and ordered judgment for the defendant. The plaintiff alleged exceptions.

H. Kingman, for the plaintiff.

C. G. Davis & W. H. Osborne, for the defendant.

DEVENS, J. The plaintiff was appointed the guardian of the defendant, and, so far as appears by the report of the auditor upon which the ruling of the Superior Court was based, was so at the commencement of the action, and still is such guardian. The action is upon an alleged contract for necessaries. That an action at common law cannot be maintained between a guardian and a ward while that relation exists, is clear. The character of that relation, the capacity in which the guardian acts, the duty to the ward's property, (even if a guardian *ad litem* may be appointed where he is interested,) forbid that they should occupy the distinctly adverse position of suitors at common law, especially as to transactions occurring since the guardianship commenced. *Brown v. Howe*, 9 Gray, 84. *Mason v. Mason*, 19 Pick. 506.

But even if the guardianship has come to an end, until at least an account has been settled in the Probate Court, and it has there been found that something is due from the ward, no such action can be maintained. The accounts between them are to be adjusted with all the facilities there offered for convenient settlement, and they are each to be held to the responsibilities

growing out of the relation in which they have been placed by the action of that tribunal. It is for their mutual protection that this should be so, and that, before any rights are sought to be enforced elsewhere, the extent of such rights should be there determined. No action can be brought against a guardian by his late ward, to charge him in an action for money had and received. It is necessary for the protection of the guardian to hold that the remedy of the ward is by proper proceedings in the Probate Court, and thereafter by action on the probate bond. *Brooks v. Brooks*, 11 Cush. 18. *Conant v. Kendall*, 21 Pick. 36. It is certainly as necessary that any claims which the guardian may have against the ward should be determined there. Where a guardian therefore had incurred what were claimed to be necessary expenses on account of a minor ward, it was held that an action at law could not be maintained by him against the ward, after the guardianship had ceased, and that his claim must be made on the settlement of an account in the Probate Court. *Hapgood v. Wesson*, 7 Pick. 47.

It is sought to distinguish this case, upon the ground that here it is found that no property of the ward ever came to the hands of the guardian. We do not understand this to be the finding of the auditor, but the fact is not important in our view. It is the relation in which the parties have stood to each other, rather than the fact that property has or has not come to the hands of the guardian, that renders it inconvenient and improper that either should undertake to sue the other at common law. In *Smith v. Philbrick*, 2 N. H. 395, the guardianship had come to an end, and it distinctly appeared that no property of the ward had ever come into the possession of the guardian; yet it was decided that until an account had been settled by the guardian in the Probate Court, and a balance had been there found due him, no action could be maintained. The guardian in the present case presented the same account here sued to the Probate Court, and it was disallowed. If erroneously so, an ample remedy was provided, but it is not to be found in this suit.

In this aspect of the case, it would be superfluous to consider whether any promise could have been implied, upon the facts reported by the auditor, as against the defendant, to pay the plaintiff's demand.

Judgment affirmed.

WAREHAM SAVINGS BANK *vs.* FRANCIS M. VAUGHAN.

Plymouth. Oct. 17. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ., absent.

A creditor, who levies an execution, issued upon a judgment obtained by him against his debtor, on land of the debtor, which is set off to him, and seisin and possession thereof are received by him in full satisfaction of his judgment, is not entitled afterwards, if the debtor becomes insolvent, to tender a deed of release of the land to the assignee in insolvency, and be admitted as a creditor for the amount of the judgment, under the Gen. Sta. c. 118, § 27, although the land, at the time of the levy, stood in the name of a third person.

APPEAL from a decision of the Court of Insolvency, disallowing a claim of the appellant bank against the estate of Lloyd Perkins, of which the appellee was the assignee. The case was submitted to the Superior Court, and, after judgment for the appellee, to this court, on appeal, upon an agreed statement of facts, in substance as follows:

The appellant recovered judgment against one Lothrop Thomas and Lloyd Perkins, at June term 1880 of the Superior Court, for \$1210.34, debt or damage, and \$17.04 costs of suit. Execution issued thereon, and, in July 1880, was duly levied on land, as the land of Lloyd Perkins, and which appeared by the levy and the return of the execution to be his estate, but which stood in the name of Almira E. Perkins, his wife. The estate so levied upon was duly set off to the appellant, and seisin and possession thereof duly delivered to it; and the execution, which was returned fully satisfied, was, with the officer's return thereon, duly recorded in the registry of deeds. The appellant received said seisin and possession in full satisfaction of the judgment.

In September 1880, Lloyd Perkins went into insolvency, and in October of that year the appellee was duly appointed assignee of his estate, and accepted said trust. In June 1881, the appellant tendered to the appellee a deed of release of said land, which he refused; and the appellant duly presented said judgment to the Court of Insolvency, to be allowed as a debt against said estate, which was disallowed.

At October term 1881 of the Superior Court, the appellant commenced an action to recover possession of said land from

Almira E. Perkins, relying upon its rights under said set-off upon the execution, which action is now pending.

E. Robinson, for the appellant.

F. M. Vaughan, *pro se*.

DEVENS, J. The execution which issued upon the judgment obtained by the appellant had, before the insolvency, been levied upon certain real estate as that of Lloyd Perkins, but which in fact stood in the name of Almira E. Perkins. It is the contention of the appellant, that the judgment still constituted a debt upon which it had obtained collateral security only; and that, under the provisions of the Gen. Sts. c. 118, § 27, it is now entitled to "release and deliver up to the assignee the premises held as security and be admitted as a creditor for the whole of his debt." This position cannot be maintained. The appellant had received seisin and possession of the real estate set off to it in full satisfaction of its judgment, and the execution had been returned fully satisfied. The judgment did not constitute a debt, at the time of the insolvency, upon which an action could have been brought, nor one that was provable against the estate of the debtor. *Dennis v. Arnold*, 12 Met. 449. *Perry v. Perry*, 2 Gray, 326. Gen. Sts. c. 118, § 25. It is true that, if it shall appear hereafter that the real estate of which seisin has been delivered to the appellant cannot be held as the property of the debtor, a writ of *scire facias* may be brought, and another execution issued upon the judgment, unless cause shall be shown to the contrary. Gen. Sts. c. 103, § 22. But the possibility that such a contingency may hereafter happen cannot make of the judgment a present existing debt.

If all that the appellant obtained by its levy be, as it claims, a right to maintain an action for the estate levied upon, it is still an action for its own benefit, which it is thus entitled to maintain because by the levy it has satisfied its judgment. There is no provision for the transfer of such a right to the assignee, nor is real estate thus levied upon to be deemed "premises held as security" in the sense of the statute. It is there contemplated that that which is to be released and delivered up is property of the insolvent upon which there is some lien or incumbrance. If this real estate when levied upon was the property of the insolvent, it is now that of the appellant, and the assignee has and

can take no interest in it. If the appellant shall by the proceedings it has commenced successfully establish its title thereto, and if the land shall prove to be of far greater value than the amount of the judgment, there is no duty that requires it to account for the surplus to the assignee, as the land was received in satisfaction of, and not as security for, the judgment.

Judgment affirmed.

JOSEPH C. TERRY *vs.* JAMES M. BRIGHTMAN & another.

Bristol. Oct. 24. — Nov. 25, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

It is within the power of the Superior Court, after a rescript has been sent down by this court, ordering judgment for the defendant in an action at law pending in that court, and an entry has been made by the clerk on the docket of that court, in accordance with the rescript, to suspend the judgment, and to allow an amendment changing the action at law to a suit in equity, during the first term and before any final judgment has been entered by that court by a special or general order; and the exercise of such power is a matter of discretion, to which no exception lies.

CONTRACT. After the former decision, reported 132 Mass. 318, this court sent a rescript to the Superior Court ordering "judgment for the defendant Brightman." At March term 1882 of the Superior Court, the clerk made an entry on the docket in accordance with the rescript. After such entry, at the same term, the plaintiff made a motion to set aside the judgment, and to amend the action by changing the same to a suit in equity. The defendant Brightman objected to the granting of the motion, on the ground that it was not in the power of the court to allow the same, and that no cause therefor was shown.

Staples, J., ruled that the court had the power to set aside the judgment and to allow the amendment; and, as a matter of right and also in his discretion, ordered said judgment to be set aside and the amendment to be allowed. The defendant alleged exceptions.

A. N. Lincoln, for the defendant.

J. M. Morton, for the plaintiff.

MORTON, C. J. Under the modern practice in this Commonwealth, an appeal, bill of exceptions or report does not transfer to this court the whole case, but only the questions of law to be revised, unless the court, upon deciding those questions, sees fit to order the record of the whole case to be transferred to this court for trial or other disposition thereof. Pub. Sts. c. 150, §§ 7, 12; c. 153, §§ 8, 15. The case remains in the court in which it was brought, whether the Supreme Judicial Court for the county or the Superior Court.

When a rescript has been sent down by this court disposing of the questions of law raised, it is the duty of the clerk to make the entry on the docket according to the rescript. But this entry is not a judgment. As the jurisdiction of the case is in the court below, the effective final judgment must be entered by that court, either by a special order or by the general order usual at the close of the term.

The decisions of this court upon the questions of law reserved are binding upon the lower court. But when, after a rescript, it appears to that court in which the case is pending that the ends of justice and the due determination of the rights of the parties require that the judgment should be suspended or the verdict set aside, it has the right to do so, unless it be inconsistent with the decision by this court of the questions of law upon which it has passed. *Commonwealth v. Scott*, 123 Mass. 418. *Platt v. Justices of the Superior Court*, 124 Mass. 353. *Loring v. Salisbury Mills*, 125 Mass. 138.

Applying these principles to the case at bar, it was within the power of the Superior Court, after the rescript was sent down, to suspend the judgment, and to allow an amendment changing the suit at law to a suit in equity, at least during the first term, and before any final judgment had been entered by that court by a special or general order. Such action of the Superior Court is not inconsistent with the decision of this court, as stated in the rescript, of the questions of law reserved for its determination.

As it was within the power of the Superior Court, the question whether the amendment should be allowed was addressed to the discretion of the presiding justice of that court, and no exception lies to his decision. *George v. Reed*, 101 Mass. 378.

Exceptions overruled.

COMMONWEALTH vs. CHARLES L. SWASEY.

Bristol. Oct. 26, 1881; Oct. 26. — Nov. 25, 1882. C. ALLEN & COLBURN, JJ., absent.

Under the St. of 1877, c. 133, which provides that in each of the cities of the Commonwealth, except Boston, the mayor and aldermen shall appoint two persons, "who together with the city physician shall constitute the board of health of such city," and under the St. of 1878, c. 21, which provides that, "in the cities of the Commonwealth where the city physician is *ex officio* a member of the board of health, said city physician shall be appointed by the mayor, with the approval of the board of aldermen, for a term of three years," the office of city physician is established in a city whose charter and ordinances make no provision in terms for such an office.

If a statute fixes the term of office of an officer of a city, who is to be appointed by the mayor with the approval of the board of aldermen, it is unnecessary that the term of his office should be expressed either in the nomination of the mayor or in the approval by the board of aldermen.

Where a city physician is *ex officio* a member of the board of health, his title to his office may be tried by an information in the nature of a *quo warranto*.

If a person is wrongfully holding a public office, he may be ousted on an information in the nature of a *quo warranto*, although the term of the person who was entitled to the office when the information was filed expires before judgment is rendered.

INFORMATION in the nature of a *quo warranto*, filed February 15, 1881, by the Attorney General in behalf of the Commonwealth, alleging that the defendant was usurping the office of city physician of the city of New Bedford. Hearing before Morton, J., who reported the case for the determination of the full court. The facts appear in the opinion.

The case was argued in October 1881, by F. A. Milliken, for the Commonwealth, and by W. C. Parker, for the defendant; and was reargued in October 1882, by Milliken, for the Commonwealth, and by H. E. Swasey & G. R. Swasey, for the defendant.

FIELD, J. It appears that, on January 28, 1879, the mayor of the city of New Bedford nominated to the board of aldermen for city physician John H. Mackie, which nomination was confirmed by the board of aldermen; that at the same time he nominated two members of the board of health, one for one year and one for two years, which nominations were also confirmed; that the board, composed of these three persons, organized on the first

Monday of February 1879; and that, on the happening of vacancies in the offices respectively of the two members of the board, other than the city physician, new members have been duly appointed, and that this organization of the board has continued until the present time.

At the time of the appointment of Mr. Mackie as city physician, there was no ordinance of the city establishing the office of city physician, and there was no provision in the city charter in terms establishing such an office. The ordinance "creating the office of city physician and defining the duties of the same," which is set out in the papers, was approved by the mayor on February 1, 1881; and on February 3, 1881, the mayor, "assuming and pretending that there was no city physician in said city," nominated the defendant to be city physician, which nomination was confirmed by the board of aldermen, and the defendant, under this appointment, has entered upon the duties of the office of city physician, and, by virtue of this office, upon the duties of a member of the board of health. Mr. Mackie has not resigned the office of city physician, has not been removed therefrom for cause, and was then, and ever since has been, ready and willing to perform the duties of the office. The St. of 1877, c. 133, was duly accepted by the city of New Bedford, pursuant to the sixth section thereof.

The questions for our decision are whether the St. of 1877, c. 133, and 1878, c. 21, established the office of city physician for the city of New Bedford, and whether, under the appointment made January 28, 1879, Mr. Mackie became the city physician for the term of three years, unless sooner removed for cause. If there were no vacancy in the office of city physician at the time of the appointment of the defendant, his appointment, having been made to take effect immediately, would be void, and the assumption by him of the duties of the office would be an intrusion.

The St. of 1877, c. 133, § 1, implies that in each of the several cities of the Commonwealth, except the city of Boston, to which the statute does not apply, there was an officer known as a city physician, who, if the city accepted the act, would, with the two persons to be appointed pursuant to it, constitute the board of health of the city. The report finds that there was

such an office established by charter or ordinance in most of the cities of the Commonwealth, although not in New Bedford.

The statute made provision for the appointment and removal of the two other members of the board, but was silent as to the appointment and removal of the city physician, assuming that the office of city physician under existing laws was established in each of the cities, and leaving the appointment and removal of this officer unchanged. But it is found in the report, that the mode of appointment and the tenure of office of the city physician, in the different cities where such an office was established before the passage of this statute, were not the same; and, apparently to secure uniformity in the mode of appointment and in the tenure of office of city physicians in the several cities of the Commonwealth which had accepted the St. of 1877, c. 133, the St. of 1878, c. 21, was passed. The first section of the last-named statute is: "In the cities of the Commonwealth where the city physician is *ex officio* a member of the board of health, said city physician shall be appointed by the mayor, with the approval of the board of aldermen, for a term of three years; and shall be subject to removal, for cause, by the same authority." This must mean the cities of the Commonwealth which had accepted the St. of 1877, c. 133; for our attention has not been called to any other statute whereby the city physician was made *ex officio* a member of the board of health of a city. The section must be construed to include all cities where, by the provisions of law, the city physician is made *ex officio* a member of the board of health. Without therefore determining whether the city of New Bedford, after the passage of the St. of 1877, c. 133, and before the passage of the St. of 1878, c. 21, could lawfully, either under the authority of the St. of 1877, c. 133, or under the authority of the General Statutes relating to cities, or under its charter, have by ordinance established the office of city physician, and appointed some person to that office, we are of opinion that, after the St. of 1878, c. 21, was passed, the city of New Bedford could appoint a city physician in accordance with the terms of that statute, who would be *ex officio* a member of the board of health of the city, constituted pursuant to the St. of 1877, c. 133. The two statutes taken together must be

construed to have established such an office for the city of New Bedford.

As both the mode of appointment and the tenure of the office are defined by the St. of 1878, c. 21, it was unnecessary that the term of office should be expressed either in the nomination of the mayor or in the approval of the board of aldermen. As a city physician appointed pursuant to these statutes is by virtue of his office a member of the board of health, which is invested with important powers to be exercised for the safety and health of the people, he is a public officer, and the title to this office can be tried by an information in the nature of a *quo warranto*.

The term of office of Mr. Mackie has expired since the argument in this court, but it is not the purpose of an information in the nature of a *quo warranto* to put any person into office, but to determine by what warrant the defendant holds the office which he assumes to hold. There must therefore be judgment, against the defendant, of ouster from the office of city physician under the appointment made by the mayor and aldermen of the city of New Bedford on February 3, 1881. *Ordered accordingly.*



DANIEL WILBUR, administrator, vs. HARRIET MAXAM
& others.

Bristol. Oct. 26. — Nov. 25, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

An executor of a will, by which the testator gives to his daughter H. certain real and personal property absolutely, and the rest and residue of his property for the support of his daughter C., cannot maintain a bill in equity to obtain the instructions of the court, if the only conflict between the persons interested in the estate, and the only question presented by the bill, is whether, at the death of C., the property is to belong to H., or is to be divided among the heirs at law of the testator.

MORTON, C. J. This is a bill in equity by the administrator, with the will annexed, of the estate of Borden C. Tallman, seeking to obtain the instructions of the court as to the construction of the will.

Such a bill may be maintained by an executor or administrator where he has funds in his hands, and, by reason of obscurity

in the will, conflicting claims are made upon him which affect his present duty and throw an obstacle in the way of his executing the will. *Putnam v. Collamore*, 109 Mass. 509. *Bradford v. Forbes*, 9 Allen, 365.

The clause of the will, as to which the administrator seeks instruction, is as follows: "To my daughter Harriet I give my half of the farm, together with produce, stock and farming implements thereon, and the rest and residue of all my property, whether real or personal, of whatsoever name or nature, for the support of my daughter Caroline E., except the following legacies."

So far as the real estate is concerned, Harriet takes it by force of the devise; the administrator has no title or interest in it, or duty in reference to it, and therefore cannot maintain a bill for instructions as to the construction or effect of the devise. *Parker v. Parker*, 119 Mass. 478. *Sprague v. West*, 127 Mass. 471.

In regard to the personal property, the bill alleges, and the report finds, that Phebe A. I. Buffinton, a daughter of the testator, contends that it is given to said Harriet, to be held by her during the life of said Caroline, for the support of said Caroline, and that, after the decease of said Caroline, it is to be equally divided among the heirs at law of said testator; and that the said Harriet contends that it is given to her for the support of said Caroline during the life of said Caroline, and that, after the decease of said Caroline, it is to be the absolute property of said Harriet.

It is clear that there is no conflict of claims here stated which affects the present or the future duties of the administrator. The only conflict between the parties, and the only question presented to us by the bill, is whether, at the death of Caroline, the property is to belong to Harriet, or is to be divided among the heirs at law of the testator.

The administrator has no interest in this question. Whether Harriet will hold the fund, after he has paid it over to her, as trustee for Caroline during her life and for the heirs of the testator at her decease, whether she shall give bonds as such trustee, and whether she holds the real estate in fee, or upon a qualified tenure, or in trust, are questions in which he has no concern, and which cannot be settled under this bill. The parties interested in them must seek other and appropriate remedies.

We are therefore of opinion that this bill cannot be maintained.

Bill dismissed.

J. M. Morton & A. J. Jennings, for the plaintiff.

H. K. Braley, for the first-named defendant.

J. Brown & J. M. Wood, for the other defendants.



MARGARET T. EAGAN, administratrix, *vs.* PATRICK LUBY
& trustee.

Bristol. Oct. 24. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

An objection that certain evidence was improperly rejected by an auditor, not raised at the trial in the Superior Court, is not open upon a bill of exceptions. Judgment is correctly rendered for the amount found by an auditor, if his report is the only evidence at the trial.

An assignment of all sums that may become due from a city to the assignor on or before a future day named, for services as janitor of a public school building, which position he has held for several years by virtue of an annual election by a committee on public property of the city, is ineffectual, as against the trustee process, to pass to the assignee sums earned before that day, but under a subsequent appointment as janitor, there being no agreement for such subsequent appointment at the time of making the assignment; although the terms of his subsequent appointment are similar to that which preceded it, and a custom prevails in that city by which he would have been entitled to keep his employment until a successor was chosen.

TRUSTEE PROCESS. The writ was dated June 7, 1880, and was served the next day. The city of Fall River, summoned as trustee, answered that, at the date of service upon it, it had in its hands the sum of \$135, money earned by the defendant. Thomas Fanton appeared as claimant of the funds in the hands of the trustee. At the trial in the Superior Court, without a jury, *Brigham*, C. J., ruled that the plaintiff was entitled to recover \$56.55, the amount found due by an auditor to whom the case had been referred; that the claimant was entitled to the money in the hands of the trustee, \$135; and that the trustee was entitled to be discharged; and ordered judgment accordingly. The plaintiff alleged exceptions, which appear in the opinion.

J. M. Wood, for the plaintiff.

M. Reed, for the defendant and claimant.

DEVENS, J. The objection that certain entries in the plaintiff's book of accounts were improperly rejected by the auditor, which the plaintiff seeks to discuss here, cannot be considered. Had the plaintiff desired to raise the question of their admissibility, he should have offered the evidence at the trial in the Superior Court, as he may offer any evidence there, whether it has been received or not by the auditor, or should have moved to recommit the report. *Allen v. Hawks*, 11 Pick. 359. *Briggs v. Gilman*, 127 Mass. 530. It does not appear even to have been presented to the presiding judge, who tried the case and who correctly rendered judgment for the plaintiff in the amount found by the auditor, his report being the only evidence. *Holmes v. Hunt*, 122 Mass. 505.

A more important question concerns the validity of the assignment made by the defendant on July 1, 1879, which purported to transfer for a good consideration all sums that might become due to him from the city of Fall River on or before July 1, 1880. The defendant had held for some two or three years an employment by virtue of the annual election of a committee on public property of the city of Fall River. This committee was entitled to make the election and appointment of the janitors of the public buildings, one of which positions was the employment referred to, and to fix their salaries. On July 1, 1879, the defendant held the position of janitor of the Slade Mill Public School, by virtue of an election thereto in the earlier portion of that year. On February 5, 1880, he was re-elected by the then existing committee for the term of one year, and his salary was fixed by them. At the time the trustee process was served, which was on June 8, 1880, there was due to the defendant the sum of \$135, or three months' pay, which had been earned subsequently to the appointment made on February 5, 1880.

The plaintiff contends that the assignment was an attempt to assign, not only what might become due to the defendant under the contract existing between the defendant and the city of Fall River on July 1, 1879, but also what he might afterwards become entitled to under a subsequent engagement; and that to this extent it was inoperative.

That money to be earned, under an engagement not yet made, is not assignable, is well settled; and the question therefore is, whether the election and appointment of the defendant on February 5, 1880, constituted a distinct contract from that which existed when the assignment was made. *Herbert v. Bronson*, 125 Mass. 475. *Mulhall v. Quinn*, 1 Gray, 105. *Hartley v. Tapley*, 2 Gray, 565. *Twiss v. Cheever*, 2 Allen, 40. It must be held to be such. While the terms were similar to that which preceded it, yet these might have been changed. Although made with the city of Fall River, yet it was made by the authority of individuals who may have been other than those by whose authority the defendant had been previously employed. The election and determination of his salary by the latter committee, with his acceptance and performance of the duties of the employment, constituted a different engagement from that which preceded it. Nor is it important that, by the custom that prevailed in the city of Fall River, he would have been entitled to keep his employment until a successor was chosen. He did not remain in it by virtue of the election which entitled him to hold it in 1879, but by the later one of February 5, 1880.

The case of *Twiss v. Cheever*, *ubi supra*, strongly resembles the case before us. The defendant was a member of the fire department, the members of which are appointed for the term of six months. It was held that an assignment of all claims which the assignor might have at a future day named, for sums of money due or to become due for services in the fire department, was ineffectual to pass to the assignee sums earned before that day but under a subsequent appointment as fireman, there being no agreement existing, at the time of making such assignment, for the subsequent appointment.

We are therefore of opinion that the learned judge erred in ruling that the claimant was entitled, by virtue of the assignment, to the sum which was due from the city when the trustee process was served.

Exceptions sustained.

JOHN M. PHILLIPS *vs.* PARDON CORNELL.

Bristol. Oct. 26. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

If damages for delay in the performance of a contract in the nature of demurrage are allowed to the plaintiff by an auditor, in a certain sum, and a comparison of his report with a verdict rendered by a jury for the plaintiff shows that this sum formed no part of the verdict, no question thereon is open to the defendant upon the argument of exceptions in this court.

In an action for breach of a contract, the plaintiff offered evidence to show that the contract was to deliver a cargo of ice for unloading at a certain wharf, upon the condition that the depth of the water there was not less than a certain number of feet; and the defendant offered evidence to show that the contract was to deliver the cargo at the wharf, without any condition as to the depth of the water. The defendant asked the judge to instruct the jury, "that if the plaintiff sold the cargo of ice to be delivered on the wharf in question to the defendant, it was the plaintiff's duty to land the cargo there before he could recover;" and that "if such was the fact, the making of a new contract, the burden is on the plaintiff; he must satisfy the jury of a new contract." These instructions were refused. *Held*, that the defendant had no ground of exception.

An auditor's report is *prima facie* evidence of the facts found by it, and, if not met or controlled by the party against whom they are found, will authorize the jury in finding those facts as found by the report.

In an action for breach of a contract to pay for a cargo of ice, the plaintiff contended that the contract was to deliver the cargo at a certain wharf, if a certain depth of water could be found there. *Held*, that he might introduce the testimony of a pilot, who endeavored, under the plaintiff's orders, to tow the vessel containing the ice to the wharf, that such depth of water was not to be found there.

CONTRACT to recover the value of a cargo of ice, and demurrage for delay in receiving it. The case was sent to an auditor, who found that the defendant had paid for the ice all that was due, except the sum of \$99.84, which sum he found to be due, together with \$192, as demurrage. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the plaintiff in the sum of \$109; and the defendant alleged exceptions, which appear in the opinion.

E. L. Barney, for the defendant.

C. W. Clifford & W. Clifford, for the plaintiff.

DEVENS, J. Without following the somewhat numerous exceptions of the defendant in the order in which he has presented them, we proceed to discuss those upon which he has relied in argument.

1. It is not necessary to determine whether demurrage, or damages for delay in the performance of his contract, in the nature of demurrage, as that term is used in admiralty, could properly have been recovered in this action against the defendant. Such damages were allowed to the plaintiff by the report of the auditor, in the sum of \$192. A comparison of this report with the verdict rendered by the jury shows that this sum formed no part of the verdict. No damages appearing to have been allowed by the jury, all questions in relation to this subject, so far as the defendant is concerned, become immaterial.

2. The defendant complains that the fourth and fifth instructions requested by him were not given. These are connected, and should be considered together. The fourth instruction requested was that the judge should instruct the jury, "that if the plaintiff sold the cargo of ice to be delivered on Hastings Wharf to the defendant, it was the plaintiff's duty to land the cargo there before he could recover." This instruction the defendant deems to have been called for by the facts in the case as they then appeared, and that the jury might well have been misled for the want of it. An examination of the evidence offered, and the claims made on behalf of the plaintiff and the defendant respectively, show that neither party asserted a contract to deliver ice on Hastings Wharf. Each contended that the contract was one to deliver ice at Hastings Wharf, the plaintiff contending and offering evidence to show that the contract was one to deliver the cargo of ice for unloading at Hastings Wharf, upon the condition that the depth of water there was not less than thirteen feet; the defendant contending and offering evidence to show that the contract was to deliver the cargo at Hastings Wharf, without any condition as to the depth of the water. An instruction as to what would be the duty of the plaintiff upon a supposed contract, such as neither party claimed to exist, could not but be confusing to a jury, and should not have been given.

The fifth instruction requested was as follows: "If such was the fact, the making of a new contract, the burden is on the plaintiff; he must satisfy the jury of a new contract." This is somewhat involved; but by the words "if such was the fact," it assumes as its basis the case supposed by the fourth instruction,

which was not supported by evidence, nor in accordance with the theory of either party. It was therefore properly refused. If all that the defendant desired was an instruction that, if any contract was once proved, any new contract or modification of it must be proved by the plaintiff, if he relied upon such new or modified contract, the defendant did not so express himself. We see no reason to doubt that the judge properly placed the burden of proof upon the plaintiff, because he declined to give an instruction a part and the basis of which was an error.

3. The instruction requested by the defendant, "that the auditor's report is only *prima facie* evidence, and that the burden is still on the plaintiff to support his case by evidence," if given in the form requested, would have led to the inference that the plaintiff was to support his case by evidence other than the auditor's report, even when that was in no way controverted. This is certainly not the case. The auditor's report does not change the burden of proof, technically speaking, which is on a party, to establish a fact essential to the maintenance of his case. But, while the burden of proof is not shifted by the auditor's report, yet, as it makes out a *prima facie* case, it is incumbent on the other party to meet and control it, or it will be conclusive against him. *Morgan v. Morse*, 13 Gray, 150. *Holmes v. Hunt*, 122 Mass. 505. Pub. Sts. c. 159, § 51. This was in substance the ruling of the presiding judge, who, having stated that the auditor's report was *prima facie* evidence of the facts found by it, added that it "discharged the burden of proof upon either party as to such facts, if there was no other evidence relating to them, and authorized the jury to find these facts as the report found them." This was not to say that the burden of proof was shifted by the auditor's report, but that it was thereby met, unless other evidence appeared.

4. The testimony of Church, the master of the steam tug, who was also a pilot, and who endeavored to tow the schooner into Hastings Wharf, was competent. As upon his own theory of the contract, the plaintiff was bound to have landed his cargo at Hastings Wharf, if a certain depth of water could be found there, he was entitled to show that an honest attempt was made to reach it under his own orders; that, for this purpose, the vessel

was placed under the immediate direction and control of a competent pilot; and that the depth of water which the defendant authorized him to expect was not to be found there.

Exceptions overruled.

RICHARD DAVIS vs. CITY OF NEW BEDFORD.

Bristol. Oct. 26. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

The St. of 1863, c. 163, gave a city the right to construct a reservoir and dam for the storage of water, and provided that the owner of any land taken by the city for the purposes of the act, or other person, who should sustain damage by the construction of any dam or reservoir, might apply by petition, for the assessment of his damages at any time within three years from the taking of said land or sustaining damage as aforesaid, and not afterwards; and that whenever any damages were sustained as above set forth, the city might, in case of neglect by the person damaged to institute proceedings for twelve months, commence such proceedings, which should be determined as if commenced by such person. *Held*, that a petition could not be maintained, after the expiration of three years from the construction of the dam and reservoir, by a person whose land was injured by water percolating through his land from the reservoir, although such percolation did not take place until after the expiration of the three years.

PETITION, filed February 15, 1882, to the Superior Court, under the St. of 1863, c. 163, § 6, for the appointment of three disinterested freeholders of the Commonwealth, to assess the damages alleged to have been sustained by the petitioner, within three years last past, by reason of the water, stored in a reservoir constructed, in connection with a dam, by the respondent city, under said statute, being forced through and upon his land. The case was submitted on agreed facts to the Superior Court, which dismissed the petition; and the petitioner appealed to this court. The facts appear in the opinion.

W. C. Parker, for the petitioner.

T. M. Stetson & L. L. Holmes, for the respondent.

DEVENS, J. The petitioner proceeds under the St. of 1863, c. 163, which was an act for supplying the city of New Bedford with pure water, and which authorized the construction of a dam

by the city for the purpose of collecting and storing the necessary supply. His petition treats that which has been done in this construction as rightfully done, and seeks to bring his case within the sixth section of the act, providing a remedy for those who may have been injured by the taking of their property, or by the constructions authorized. This section, so far as it need now be considered, is as follows: "The said city of New Bedford shall be liable to pay all damages that shall be sustained by any persons in their property by the taking of any land, water or water-rights, or by the constructing of any dams, aqueducts, reservoirs, or other works, for the purposes of this act. And if the owner of any land, water or water-rights, which shall be taken as aforesaid, or other person who shall sustain damage as aforesaid, shall not agree upon the damage to be paid therefor, he may apply by petition, for the assessment of his damages at any time within three years from the taking of said land, water or water-rights, or sustaining damage as aforesaid, and not afterwards, to the Superior Court in the county in which the same are situate, unless sooner barred, as provided in the seventh section of this act." The dam was completed in 1867. No change has taken place in it since that time, which was some fifteen years previously to the filing of the petition; but the petitioner complains that, within the three years before the filing of his petition, the water stored in the reservoir created by the dam has been forced through and upon his land, making it cold, wet and heavy, and doing other injuries thereto.

There have been several occasions when it has been necessary to construe acts where, either for public purposes or to aid in enterprises of a public and general character, the construction and permanent maintenance of dams have been authorized. These acts have contained provisions for the protection of those whose lands or other property is taken, or who sustain damage by such structures, but in nearly all it has been provided that the remedy must be pursued within a comparatively short limitation of time. It has been held that, notwithstanding the difficulty of determining within a brief period what is the damage sustained by land or property not taken, it must still be done within the time limited. *Heard v. Middlesex Canal*,

5 Met. 81. *Call v. County Commissioners*, 2 Gray, 232. *Ipswich Mills v. County Commissioners*, 108 Mass. 363.

The reasons why this should be so are certainly as strong in the present case as in those cited. Unless there were a single assessment within a definite period, the cost of such a work could not be ascertained and provided for, as there might be a continued recurrence of claims of indefinite extent and for an indefinite period. Again, that which the respondent should pay is the damage which it has occasioned by diminishing the value of the land, as it existed at the time of the construction, and not as it may exist years afterwards, when increased population or other reasons may have materially added to such value. *Heard v. Middlesex Canal, ubi supra.*

The petitioner deems that the language of the act under consideration, perhaps in view of the decisions already cited, has been chosen to meet cases such as that which he presents; and that it is intended thereby to provide a remedy for damages, as from time to time they may appear to have been occasioned, to lands not taken. But a careful examination of the act shows that this cannot be its true construction. Although those sustaining damage may proceed within three years according to the provisions of the sixth section of the act, yet they are liable to be barred by the action of the city under the seventh section, which permits the city after twelve months to commence proceedings on its own behalf, which are to be determined in the same manner as if commenced by those who have sustained damage. These limitations would be nearly valueless, if a right to litigate continued at any time thereafter whenever a petitioner could prove additional damage.

The petitioner contends that it was only many years after the construction of the dam that he sustained actual damage; that previously thereto it was speculative merely. The injury likely to arise to land from the flowing thereof is more readily seen and determined, undoubtedly, than that which may proceed from percolation or underground currents of water, when it is collected and stored in a reservoir in the vicinity of a tract of land. Yet, if by exposure to danger therefrom the land is diminished in value, such loss or diminution would afford a fair measure of the owner's damage. *Heard v. Middlesex Canal, ubi supra.*

The time within which the petitioner was entitled to make his application might also well have appeared to the Legislature as sufficiently long to determine, by the test of actual experiment, what injury was likely to be done, or what might be reasonably apprehended from any diminished capacity of the land for cultivation or improvement, and thus what was the depreciation in value of the land.

Judgment affirmed.

LOTTA CRABTREE *vs.* BENJAMIN F. RANDALL.

Bristol. Oct. 17. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

A partner, who has had the management of the business of the firm, and has never made a settlement with or rendered a final account to his copartner, and whose duty it is to wind up the affairs of the partnership on its dissolution, is chargeable with interest, as between himself and his copartner, on moneys drawn from the firm over and above what he was entitled to draw, on the amount of a debt incurred by a third person for which he was liable, and on his share of the net general loss upon the business, from a reasonable time after the firm is dissolved, or from such time as he has had the benefit of the sums withheld by him.

BILL IN EQUITY to settle the affairs of a partnership. The case was referred to a master, who found for the plaintiff, and the defendant alleged an exception, which was overruled at the hearing before a single justice; and the defendant appealed to the full court. The facts appear in the opinion.

J. M. Morton & A. J. Jennings, for the plaintiff.

N. B. Bryant, for the defendant, cited *Hunt v. Nevers*, 15 Pick. 500; *Goff v. Rehoboth*, 2 Cush. 475; *Palmer v. Stockwell*, 9 Gray, 237; *Harrison v. Conlan*, 10 Allen, 85; *Stimpson v. Green*, 13 Allen, 326; *Ordway v. Colcord*, 14 Allen, 59.

DEVENS, J. The only exception reserved is that to the alleged error of the master in allowing interest upon the sum found due by the defendant from June 29, 1877, the defendant contending that this should have been allowed only from the filing of the bill on January 15, 1879.

The amount found due from the defendant is composed of three sums: the first consisting of moneys drawn from the firm over and above what he was entitled to draw; the second, the sum for which he was liable to the plaintiff upon the debt incurred by Randall and Leavitt; and third, his share of the net general loss upon the business.

That which the plaintiff was entitled to receive was, first, the amount paid in by her over and above what she had withdrawn; and second, the amount which she was entitled to receive as her share of the debt incurred by Randall and Leavitt, which it was the duty of the defendant to pay. From these sums was to be deducted her share of the net general loss upon the business.

Notice to dissolve the firm, which might be given by either party to terminate in three months, was given by the plaintiff on January 1, 1877. It was therefore dissolved on April 1, 1877. All the sums which it was the duty of the defendant to pay in were to be received by the plaintiff, and the time fixed by the master for the commencement of interest, as against the defendant, is the date of the last payment made to the plaintiff. No settlement was ever made or final account rendered by the defendant, who managed the business of the firm, and whose duty it was to wind up its affairs. He denies in his answer that anything is due from himself. While reasonable time is allowed to a surviving or remaining partner to wind up the affairs of a firm and to collect and pay its debts, he is liable, after such reasonable time has expired, to pay interest upon the funds he holds or the amounts due from him. *Washburn v. Goodman*, 17 Pick. 519.

When a partner receives partnership funds, mingles them with his own, and, being charged with the duty of winding up the affairs of the partnership, uses them for his personal purposes, he is properly chargeable with interest from the time they were thus appropriated. *Dunlap v. Watson*, 124 Mass. 305. The cases cited by the defendant, to the effect that interest is not ordinarily to be allowed on an unliquidated debt except from the time of action brought, do not apply to the case of a partner winding up the affairs of a firm. Its property and assets in his hands are in the nature of trust property. The sum overdrawn by the defendant, the debt incurred by Randall and Leavitt for

which he was chargeable, his proportion of the net loss so long as it remained unpaid, were in the nature of funds of the firm of which he had the benefit. As, if he mingles the funds of the firm with his own, he may be obliged to pay interest thereon, it is equally reasonable that he should do so when they consist of debts and liabilities due from him.

While the report of the master on the matter of interest is somewhat meagre, it is for the defendant to show that there is error therein. Upon the case as presented to us, it is not possible to say that the master was not justified in holding that the defendant should pay interest from June 29, 1877, upon the sums found due from him, either upon the ground of an unreasonable delay in settling the affairs of the partnership, or because he has had the full benefit, since that time, of the sums withheld by him.

Decree affirmed.

MARY K. BOYCE *vs.* WILLIAM H. WHEELER, trustee, & others.

Essex. Nov. 9. — 25, 1882. LORD, C. ALLEN & COLBURN, JJ., absent.

A refusal of the Superior Court to confirm and to render judgment upon the report of commissioners appointed to make partition, on the ground that it is invalid in law, is an interlocutory and not a final decision, and exceptions thereto are prematurely entered in this court.

MORTON, C. J. The rule of law is well settled that, in cases pending in the Superior Court, questions of law arising therein cannot be entered and heard in this court, upon appeal or exceptions, until after final judgment in the Superior Court. Until such final judgment, this court has no jurisdiction to hear and determine the questions of law. *Platt v. Justices of the Superior Court*, 124 Mass. 353. *Kellogg v. Kimball*, 122 Mass. 163. *Gifford v. Rockett*, 119 Mass. 71. *Harding v. Pratt*, 119 Mass. 188. *Crompton Carpet Co. v. Worcester*, 119 Mass. 375. *Hogan v. Ward*, 117 Mass. 67. *Marshall v. Merritt*, 13 Allen, 274.

This rule applies to the case at bar. It is a petition for partition, upon which judgment for partition was rendered at a former term, and commissioners to make partition were

appointed. The commissioners made their report, and the Superior Court refused to confirm the report and to render judgment upon it, upon the ground that it was invalid in law. To this ruling of the court the respondents alleged exceptions. There has been no final judgment in the case, and it is not ripe for a final judgment. If this court were to hold that the ruling was wrong, no final judgment could be ordered or entered. The Superior Court might confirm the report and order judgment thereon, or it might for sufficient cause refuse to confirm it, and recommit the matter to the same or other commissioners. The decision of the court to which exception was taken was an interlocutory decision, and therefore the exceptions in this case have been prematurely entered in this court.

Exceptions dismissed.

C. P. Thompson, (J. F. Hannan with him,) for the respondents.

S. B. Ives, Jr., for the petitioner.



MEHITABLE ELLIOT vs. ELIZA A. ELLIOT & others.

SAME vs. SAME.

Essex. Nov. 10. — 25, 1882. LORD, C. ALLEN & COLBURN, JJ., absent.

No appeal lies from a judgment of the Superior Court in favor of the petitioner, on a petition by a widow to have land of her late husband set off to her under the Gen. Sts. c. 90, § 15, and the St. of 1861, c. 164, § 1, or under the St. of 1880, c. 211, there being no final judgment in the case.

THE FIRST CASE was a petition to the Probate Court by the widow of Isaac B. Elliott, who died testate on January 17, 1881, leaving no issue living, alleging that, having waived the provisions of her husband's will, she was, under the St. of 1880, c. 211, entitled in fee to real estate of her husband to the amount of \$5000, and praying that it might be assigned to her according to law.

THE SECOND CASE was a petition to the same court by the same person, alleging that under the Gen. Sts. c. 90, § 15, and

the St. of 1861, c. 164, § 1, she was entitled, in lieu of dower, to a life estate in one half of the real estate of her husband not assigned to her under the first petition in fee, and praying that such an estate might be assigned to her as provided by law.

The judge of probate in each case entered a decree reciting that the share of the petitioner was in dispute, and ordering the petition to be removed to the Superior Court.

The cases were submitted to the Superior Court, on agreed facts, which it is unnecessary now to state. The court ordered judgment to be entered for the petitioner in each case; and the respondents appealed to this court.

H. Wardwell, for the petitioner.

S. B. Ives, Jr., for the respondents.

MORTON, C. J. We are of opinion that the court has no jurisdiction of these cases. There has been no final judgment in the Superior Court in either case. *Boyce v. Wheeler, ante*, 554, and cases cited.

The judgment of the Superior Court in each case is that the petitioner is entitled to have assigned to her the real estate, or her interest therein, according to her petition. It is in its nature like the interlocutory judgment for partition, and must be followed by other proceedings before the case is ready for final judgment. Gen. Sts. c. 90, §§ 3, 5, 15, 17. Pub. Sts. c. 124, §§ 10, 11, 17. St. 1880, c. 211, § 2.

Commissioners to assign to her the land, or her interest therein, must be appointed, and, until their report and its acceptance by the court, there can be no final disposition of the case.

Appeals dismissed.

JOSEPH BATTEN vs. DAVID C. SISSON.

Suffolk. November 14. — 16, 1882. LORD & W. ALLEN, JJ., absent.

The effect of a discharge in insolvency is to be determined by the law in force at the time it is granted, and not by the law in force at the time the proceedings in insolvency are begun.

TORT against a constable of the city of Boston, for conversion of the goods and chattels of the plaintiff, by having taken the same on an execution against his son.

The cause was tried, before a jury, at January term 1881 of the Superior Court, and a verdict was rendered for the plaintiff. Subsequently, on February 28, 1881, and before judgment, the defendant duly filed his petition in insolvency, and the first publication of the warrant was made on said date, and notice of the insolvency proceedings was noted on the docket of the Superior Court; and on that day, on motion of the defendant, the cause was continued to await the result of said insolvency proceedings. On October 14, 1881, the defendant received his discharge in insolvency, and pleaded the same in this cause as a bar to the entry of any judgment against him.

On November 21, 1881, the cause was heard by *Bacon, J.*, on the motion of the defendant, that judgment be entered for the defendant, without costs, on account of the defendant's discharge in insolvency, and on the plaintiff's motion for judgment on the verdict. It was admitted that, at the time of the rendition of the verdict, the debt or claim sought to be secured by the plaintiff would be barred by a discharge in insolvency, as the law then stood. It was also admitted that, subsequently to the publication of the notice of the issuing of the warrant in insolvency, and while these insolvency proceedings were pending, namely, on May 11, 1881, the Legislature amended the law relating to the discharge of insolvent debtors by inserting in the fourth line of section 79 of chapter 118 of the General Statutes the words, "or a claim against a debtor for goods attached on mesne process or taken on execution by him as an officer, or for misfeasance in office." The validity of the insolvency proceedings was not contested, and the single issue was on the effect of the discharge.

The defendant asked the judge to rule that the discharge took effect, not from its date, but from the commencement of the proceedings in insolvency; and that the subsequent change of the law by the Legislature did not affect this case.

The judge declined so to rule; but ruled that the change in the law operated to bar the effect of the discharge in this case, and ordered judgment on the verdict. The defendant alleged exceptions.

H. J. Edwards & S. H. Tynng, for the defendant.

E. M. Bigelow, for the plaintiff.

DEVENS, J. Had the law, which was in force at the time the defendant commenced proceedings to obtain a discharge under the insolvent law, remained unaltered until such discharge was granted, it would have operated to release him from the debt in suit. Subsequently to the issuing of the warrant of insolvency upon the defendant's petition, and while the insolvency proceedings were pending, but before final judgment against him was rendered, the Legislature, on May 11, 1881, (St. 1881, c. 257, § 2,) amended the law relating to the discharge of insolvent debtors by inserting in § 79 of the Gen. Sts. c. 118, which provided that debts arising from certain defalcations should not be discharged under the insolvent law, the words, "or a claim against a debtor for goods attached on mesne process or taken on execution by him as an officer, or for misfeasance in office." The claim against the defendant was of such a character that it would be included by this clause, although not by the section as it previously stood. The presiding judge ordered judgment to be rendered against the defendant, thus treating the effect of the discharge obtained by him as determined by the law as it existed at the time it was granted, and not by the law in force at the time of the commencement of the proceedings. This ruling was correct.

In *Lane, appellant*, 3 Met. 213, it was held that the St. of 1841, c. 124, § 3, — which so altered the provisions of the St. of 1838, c. 163, that no certificate of discharge could be granted to a debtor, who, within six months before the filing of a petition by or against him, had given a preference to a preëxisting creditor, — applied to a debtor who had filed his petition for the benefit of the latter statute before the former was enacted. The

court could not grant a certificate of discharge against a prohibition of the statute. Nor had the petitioner any such vested right to a discharge, at the time of filing the petition, that either its effect, or the requisites to obtain it, might not be altered by the Legislature at any time before it was granted. At the time of his application, he must show that he is within the provisions of the statutes as they then exist, and the effect of such a discharge can be no broader than the statutes then permit.

So it has been held that the provisions of the St. of 1844, c. 178, apply to proceedings in insolvency which were pending when it went into operation, so far as these provisions were inconsistent with previous statutes. *Eastman v. Hillard*, 7 Met. 420. *Eddy v. Ames*, 9 Met. 585.

As contended by the defendant, a discharge, when granted, takes effect, not from its date, but from the commencement of proceedings in insolvency, which is the first publication of the notice upon the warrant, and relates back to that time. *Cook v. Shearman*, 103 Mass. 21. *Thayer v. Daniels*, 110 Mass. 845. But the extent of its operation depends upon the law in force when the discharge is granted. *O'Neil v. Harrington*, 129 Mass. 591.
Exceptions overruled.



MARGARETTA SCHRAMM vs. FREDERICK STEPHAN, JR.

Suffolk. November 16. — 17, 1882. LORD & W. ALLEN, JJ., absent.

The Gen. Sts. c. 72, providing for the maintenance of bastard children, does not apply to the case of a child, which is still-born, and which, if born alive, would be a bastard.

COMPLAINT under the bastardy act, Gen. Sts. c. 72.

At the trial in the Superior Court, before *Gardner*, J., the complainant introduced evidence tending to show that, on November 6, 1881, she was delivered of a child, which was begotten by the respondent on or about March 6, 1881; and that she never saw the child, and was unconscious at the time of the delivery. The respondent called, as a witness, the physician who

attended upon the complainant at the hospital, and he testified that she was delivered of a still-born foetus, which the witness considered to be about eight months old; that it had been dead some days before it was born; and that his impression was that it was buried by the city of Boston.

There being no controversy as to the facts testified to, the judge ruled, as matter of law, solely on the ground that the child was still-born, that the complaint could not be maintained; and ordered a verdict of not guilty for the respondent. The complainant alleged exceptions.

H. H. Smith, for the complainant.

W. S. Frost, for the respondent.

BY THE COURT. Our statute, as the title implies, is designed to make provision for "the maintenance of bastard children." The only order which the court can pass is that the adjudged father "shall stand charged with the maintenance thereof, with the assistance of the mother, in such manner as the court shall order; and shall give bond with sufficient sureties to perform said order, and also to indemnify and save harmless against all charges of maintenance her parents and any city or town or the State chargeable with the maintenance of such child." Gen. Sts. c. 72. Pub. Sts. c. 85. Until born, the child is not the subject of maintenance. It is clear that the statute applies only to the case of a bastard child born alive, and not to a case like the present one, of a still-born child. The only order the court can issue, applied to the last-named case, would be inoperative and absurd. *Commonwealth v. Cole*, 5 Mass. 517.

Exceptions overruled.

ANDREW LAWRENCE & others vs. WILLIAM D. LEWIS.

Suffolk. November 17, 1882. LORD & W. ALLEN, JJ., absent.

In an action against the owner of a hotel for the price of furniture sold and delivered, on the order of a person who had the general management of the hotel, with the defendant's consent and for his benefit, the only evidence was the report of an auditor, who found that the furniture was suitable for the hotel and was used in its equipment; that the defendant knew that the manager had ordered similar articles from the plaintiff, for which he did not deny that he was liable; that the defendant gave no notice to the plaintiff that the manager had no authority; that, two months after the goods sued for were delivered, the defendant had knowledge of the way in which the goods were ordered, and never offered to return them, or notified the plaintiff to take them away; and that all the goods had, since their delivery, been at the hotel, in the possession and under the control of the defendant; and found for the plaintiff. *Held*, that the questions, whether the manager had authority to buy the goods on the credit of the defendant, and whether, if he had not authority, the defendant had ratified his acts, were questions of fact proper to be submitted to the jury upon this evidence; and that all the findings of the auditor were pertinent and material upon both these issues.

CONTRACT, on an account annexed, for goods sold and delivered. Writ dated November 26, 1880. The case was referred to an auditor, whose report was in substance as follows:

The plaintiffs are furniture-dealers in Boston, and the defendant is the owner of a summer hotel in Maine. During the summer of 1880, the defendant carried on the hotel, and employed one Porter as general manager and clerk, and one Tuttle as a second clerk, who was subordinate to Porter, and under his orders. The hotel was open from June 1 to September 1, 1880, and Porter was at the hotel all this time and managed it for the defendant. All the goods, which consisted of furniture, for the price of which the action is brought, were delivered at the hotel during the summer of 1880, were suitable for the house, and used in its equipment, and the prices charged are reasonable.

Some of the goods in question were ordered by the defendant, others by Porter, and others partly by Porter, and partly by Tuttle with the knowledge of Porter. The defendant did not contest his liability for the goods ordered by himself, but contended that he was not liable for the others.

The defendant visited the hotel usually each week, spending two or three days there; and, while there, he had the general

oversight of the business, and gave directions concerning it. Porter had no authority from the defendant to purchase any of the goods in question, except such as may be implied from the facts herein reported. The plaintiffs had no knowledge as to the scope of Porter's agency, except as herein appears. They did know, before the goods were sold, that the hotel was conducted in the name of Porter, and that the defendant was the owner.

Among the goods ordered by Porter were two tables which were used in the dining-room of the hotel. The defendant was informed, when these tables arrived, that Porter had ordered them; and no objection is made to his being charged for them. [The defendant gave no notice to the plaintiffs that Porter had no authority to purchase said tables. All the goods sued for, ever since their delivery, have remained at said hotel, and have all been in the possession and under the control of the defendant.]

Except as above stated, there was no evidence that the defendant knew of said orders by Porter and Tuttle, or of the delivery of the goods, until September 1880. In that month, bills for all of the goods were delivered by Porter to the defendant. The plaintiffs called upon the defendant for payment of their account, and the defendant was then fully informed of all the facts respecting the goods and the purchase thereof. He then told the plaintiffs that Porter had no authority to purchase the goods as his agent. [The defendant never offered to return to the plaintiffs any of said goods, and never notified or requested the plaintiffs to take any of them from said hotel.]

On these facts, the auditor reported that the plaintiffs were entitled to recover the whole amount sued for.

In the Superior Court, the defendant moved to strike out, as immaterial, those parts of the auditor's report which, as printed above, are enclosed in brackets, or to recommit the report to the auditor for that purpose. This motion was overruled.

At the trial, before *Pitman*, J., the only evidence offered was the auditor's report. The defendant objected to the parts enclosed in brackets being read to the jury. The judge permitted them to be read. The defendant then requested the judge to rule that, upon the facts reported in the auditor's report, the

plaintiffs could not recover for the goods ordered by Porter, except the tables, or for those ordered partly by Porter and partly by Tuttle; and that the jury should not consider, in making up their verdict, the parts of the auditor's report enclosed in brackets.

The judge refused to rule as requested; the jury returned a verdict for the plaintiffs for the full amount sued for; and the defendant alleged exceptions.

C. P. Weston, for the defendant.

T. F. Nutter, for the plaintiffs, was not called upon.

BY THE COURT. The questions, whether Porter and Tuttle had authority to buy the goods sued for, upon the credit of the defendant, and whether, if they had not original authority, the defendant ratified their acts, were questions of fact. The parts of the auditor's report objected to were pertinent and material upon these questions. The court properly submitted the auditor's report and these questions to the jury.

Exceptions overruled.

SARAH V. FROST vs. DOMESTIC SEWING MACHINE COMPANY.

Suffolk. November 17. — 28, 1882. LORD & W. ALLEN, JJ., absent.

In an action against a corporation for an assault and battery and false imprisonment by its agents and servants, the plaintiff's evidence showed that a certain machine bought by him of the defendant was replevied upon a writ, in favor of the defendant, brought by one S., an attorney, who, in its service, committed the torts sued for; and that the replevin bond was signed by the defendant, by G. manager. The plaintiff also offered to show that, at the trial of the replevin writ, G. testified that he was the manager and agent of the defendant; and further offered to prove that, before that writ was sued out, G., as such manager and agent, employed an attorney to sue out the writ; that the writ was placed in the hands of a person for service; and that, upon the refusal of this person and the attorney to serve the writ by committing a breach of the peace, G. said "he would find some one to obtain the machine;" and then followed the employment of, and service by, S. *Held*, that this evidence should have been submitted to the jury upon the question of S.'s agency.

TORT, in two counts, for assault and battery and false imprisonment by the defendant's agents and servants. Trial in the

Superior Court, before *Rockwell, J.*, who reported the case for the determination of this court, in substance as follows:

The plaintiff testified that, in December 1880, her husband received a sewing machine, under a bargain for the sale thereof, on certain conditions contained in an agreement between him and the defendant, signed by him, and witnessed by one Dill, who in said agreement represented himself as agent for the defendant, and by whose solicitations the agreement was made. The plaintiff also put in evidence a replevin writ, issued from the office of Joseph P. Silsby, an attorney at law, in favor of this defendant, against E. O. W. Frost, the husband of the plaintiff, for the replevin of the machine received by him. Said writ was dated May 12, 1881, and the officer's return thereon showed that he, by virtue thereof, replevied the machine, which was receipted for on the writ by Silsby, as attorney for this defendant. The replevin bond was signed, as principal, by this defendant by "J. A. Goodwin, manager." Said writ was duly entered in court, went to trial and judgment, an appeal was taken by this defendant to the Superior Court, the bond to prosecute the appeal was signed by and in behalf of this defendant, as principal, by its attorney of record, said Silsby, and the appeal was entered in the Superior Court, where it was finally disposed of by agreement. The plaintiff also testified to the assault and battery and false imprisonment by said Silsby, on the date of, and at the time of service of, said replevin writ; and that, at the trial of the replevin suit, said Dill testified that he was the duly authorized agent of this defendant, and was, as such, authorized to enter into and make agreements for the sale of machines.

The plaintiff offered to prove, that, at the trial of the replevin suit, said Goodwin was present, and testified that he was the manager and agent of this defendant for Massachusetts, and also heard the testimony of Dill, without making any denial thereof; that, a few days prior to the suing out of the replevin writ by Silsby, Goodwin, as general manager and agent for this defendant, employed the law firm of Richardson and Hale to sue out a writ of replevin for said machine from the plaintiff's husband; that the replevin writ was placed in the hands of one Ware for service; that Goodwin, in company with Mr. Hale, as attorney for this defendant, called on Ware to ascertain why

the writ had not been served; that Ware informed them he had endeavored to obtain possession of the machine, but could not without committing a breach of the peace, which he and Mr. Hale declined to do; and that thereupon Goodwin said he would find some one to obtain the machine; and then followed the employment of Silsby as attorney, and the service of the writ, with the torts of Silsby, as herein stated.

The defendant, at the close of the plaintiff's evidence, asked the judge to rule that the action could not be maintained, because there was no evidence legally competent to prove, either in the testimony given in the case, or in that offered by the plaintiff, that Silsby was the agent of the defendant corporation, or acting under any authority of the corporation. The judge so ruled; and the jury returned a verdict for the defendant.

If the rulings and refusals to admit the evidence offered were correct, judgment was to be entered on the verdict; otherwise, the verdict to be set aside, and a new trial ordered.

J. F. Kilton & M. Dolan, for the plaintiff.

D. F. Fitz, for the defendant.

COLBURN, J. We are in doubt whether there was any question made in this case that Goodwin was the manager of the defendant. If there was such question, we think the offer of the plaintiff to prove that Goodwin, as general manager and agent of the defendant, did certain things, included an offer to prove that he sustained that relation to the defendant, and was not merely an offer to prove that he acted in that capacity.

The general manager and agent of the defendant must be presumed, *prima facie* at least, to have had authority to institute the replevin suit, and to employ an attorney at law for that purpose.

There was evidence that Silsby was an attorney at law, and that he brought the replevin suit and caused the writ to be served; and, if the plaintiff sustained her offer of proof, there would have been evidence sufficient to warrant the jury in finding that he was employed for that purpose by the defendant, through its manager, and that he was for that purpose the agent of the defendant.

We do not understand by the report that any question is raised that the defendant is responsible for the acts of Silsby in

committing the assault and battery, if he was its agent, though this question is discussed at length in the plaintiff's brief. But if it was intended to raise this question, there are not sufficient facts reported to enable us to determine it.

New trial ordered.

HUGH DRUM *vs.* PATRICK DRUM.

Barnstable. November 14. — 28, 1882. LORD & W. ALLEN, JJ., absent.

In an action upon a promissory note, if it appears that the note has been materially altered since its delivery, and the plaintiff proves that the note has never rightfully or to his knowledge been in the possession of any one but himself and his agent, and that the alteration was not made by him or by his agent, or with the knowledge or consent, directly or indirectly, of either of them, he is entitled to recover on the note as originally written, although he is unable to prove the circumstances of its alteration.

In an action upon a promissory note, which has been altered since its delivery, if its original tenor is apparent on inspection, it is sufficient to declare upon it in the usual form; and, upon showing that the alteration is a mere spoliation, there is no variance between the allegation and the proof.

CONTRACT upon a promissory note for \$100, dated October 19, 1869, payable on demand to the plaintiff, or order, signed by the defendant, and witnessed. Writ dated September 28, 1878. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The plaintiff offered the note in evidence; and the signatures of the defendant and of the attesting witness were proved. It appeared that the note, after its delivery to the plaintiff, who could neither read nor write, had been changed in the following respects: the figures "\$100" had been made to read "\$136," or "\$156;" the word "dollars" had been made to read "fifty," or "thirty," the word "six" being interpolated thereafter; and the word "on" changed to "dollars," and another word "on" interpolated before the word "demand."

The plaintiff testified that he knew nothing about the erasures and changes above described, and neither made them himself, nor directly or indirectly authorized the same to be made; and the

agent of the plaintiff, in whose possession the note was left for a time, testified the same as the plaintiff, as to her knowledge of, and relation to, said erasures and changes.

The defendant objected that the plaintiff was not entitled to recover upon the note, unless he first explained and accounted for said changes and erasures; and that there was a variance between the plaintiff's allegations and the proofs.

The plaintiff asked the judge to instruct the jury as follows: "If the jury believe that said \$100 note was altered without the knowledge or consent of the plaintiff, and without his agency, directly or indirectly, it is not, in law, an alteration, but a mutilation or spoliation; and the note would be good for, and according to, its original tenor."

The judge declined to give this instruction; but instructed the jury as follows: "The note of \$100, appearing to be materially altered, is void, unless the plaintiff proves that it was altered by consent of the defendant, or proves the circumstances of its alteration, as well as that he did not make or procure it; the alteration would not be sufficiently explained by proof that the plaintiff did not make, direct or procure it."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. M. Day, for the plaintiff.

H. P. Harriman, for the defendant.

COLBURN, J. The note declared on in this case was for \$100, signed by the defendant, and payable to the plaintiff, or order. Upon the production of the note, it appeared to have been changed from a note for \$100 to a note for \$136, or \$156, in the manner stated in the exceptions.

It was proved at the trial, that this note was originally a valid note for \$100, and it was not pretended that it had ever been changed with the knowledge or consent of the defendant. The note was not indorsed, and, so far as appears, had always been owned by the plaintiff, and in his possession or in that of his agent.

These changes, under the circumstances, rendered the note *prima facie* void, and the burden was upon the plaintiff to explain them. If the changes had been made by the plaintiff, or by his authority or consent, directly or indirectly, the note was

absolutely void. *Adams v. Frye*, 3 Met. 103. *Fay v. Smith*, 1 Allen, 477. 1 Greenl. Ev. § 564. But if the changes had been made by a stranger, without the knowledge or consent of the plaintiff, directly or indirectly, the note remained a valid note, according to its original tenor. *Adams v. Frye*, *ubi supra*. 1 Greenl. Ev. § 566.

If the plaintiff proved that the note had never rightfully, or to his knowledge, been in the possession of any one but himself and his agent, and that the alterations were not made by him or his agent, or with the knowledge or consent, directly or indirectly, of either of them, he was entitled to recover on the note, as originally written, though he might not be able to prove the circumstances of its alteration; and there was evidence tending to show that these were the facts in this case.

We are of opinion that the judge erred in instructing the jury, as he apparently did, in effect, that proof of the state of facts above supposed would not entitle the plaintiff to recover. Of course, we express no opinion as to the credibility of the evidence at the trial, or the probability that such changes as were made in the note would have been made by a stranger. These are considerations for the jury.

If, as we infer from the exceptions, the tenor of the note, as originally written, was apparent upon inspection of the note, it was sufficient to declare upon it in the usual way; and, upon showing that the changes in the note were mere spoliations, there would be no variance between the allegation and proof.

Exceptions sustained.

COMMONWEALTH vs. BENJAMIN H. FRANKLIN.

Worcester. Oct. 3. — Nov. 25, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

If a person makes a sidewalk about four feet wide in the street in front of his land, marking the outer line by trees, posts and stones, and at one end the walk touches the line of his land and at the other end is about eight feet from the line of his land, it is error to rule, at the trial of an indictment for obstructing the highway, that the walk is an illegal structure, and not in accordance with the Gen. Sts. c. 45, § 6; but it is a question of fact for the jury whether the walk is an unreasonable obstruction.

MORTON, C. J. This is an indictment for obstructing a highway. It appeared at the trial that the defendant made a sidewalk in the street in front of his land, marking the outer line by trees, posts and stones; he made a concrete walk of about four feet in width; at the southerly end, this concrete walk touched the line of his land; at the northerly end, the outer line of the concrete walk was about twelve feet from the line of his land. Thus at the northerly end a space of about eight feet was left between the concrete walk and his fence, which gradually lessened as the southerly end was approached.

The bill of exceptions is somewhat obscure, but, as we understand it, the presiding justice ruled that the walk was an illegal structure, and not in accordance with the statute, and in law made the defendant liable to indictment, without inquiring whether, as matter of fact, it was an unreasonable obstruction. We are of opinion that this ruling was based upon too strict a construction of the statutes.

The Gen. Sts. c. 45, § 6, provide that "a person, owning or occupying lands adjoining a highway or road in a town, may construct a sidewalk within such highway or road, and along the line of such land, indicating the width of such sidewalk by trees, posts or curbstones, set at reasonable distances apart, or by a railing." This statute gives to an abutter the privilege of appropriating a part of the highway for the purposes of a sidewalk, but the privilege is limited and qualified by provisions that the section "shall not diminish or interfere with the authority of

surveyors of highways, or any other authority that can be legally exercised over highways or roads; nor shall it in any manner diminish the liability of any person for unreasonably obstructing highways or roads." See *Macomber v. Taunton*, 100 Mass. 255; *Appleton v. Nantucket*, 121 Mass. 161. The statute does not provide how much of the highway may be appropriated for a sidewalk, nor how it shall be built, nor that it shall be of uniform width, nor that the outer line shall be parallel with the line of the land of the abutter. The Legislature deemed that the rights of the public would be sufficiently guarded by making the right to construct and maintain a sidewalk, and to define its limits by posts or trees, subject to the condition that it must not unreasonably obstruct the way.

The words "along the line of such land" do not necessarily import that the part of the sidewalk finished for travel must at all points touch or be parallel to the line of the land. It may happen that, owing to the peculiarities of the land, or because of the direction which public foot travel had before taken at this place, it would be more convenient and better to finish the foot-walk, as was done in this case, in a direction not exactly parallel with the landowner's fence.

The court erred in ruling, as matter of law, that a sidewalk thus built was unlawful. It should have been left to the jury to decide whether it unreasonably obstructed the highway.

Exceptions sustained.

A. J. Bartholomew, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

COMMONWEALTH vs. JOHN BLANEY.

Bristol. Oct. 24. — Nov. 29, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

An indictment on the Pub. Sts. c. 202, § 19, alleging that the defendant, at a time and place named, "with force and arms, with malicious intent one A. then and there to maim and disfigure, in and upon the said A. feloniously did make an assault," and that he "a portion of the nose of the said A. then and there feloniously and maliciously did bite off," is a good indictment for assault and battery; and a motion to quash the indictment, on the ground that it does not properly set forth the offence described in the statute, and a motion that the defendant be allowed to plead specially to the charge of assault and battery, are rightly overruled.

INDICTMENT on the Pub. Sts. c. 202, § 19, charging that the defendant, on April 9, 1882, at Attleborough, "with force and arms, with malicious intent one Ann Blaney then and there to maim and disfigure, in and upon the said Ann Blaney feloniously did make an assault;" and that the defendant "a portion of the nose of the said Ann Blaney then and there feloniously and maliciously did bite off." At the trial in the Superior Court, before *Colburn, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

J. Brown, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

DEVENS, J. The statute has created a highly penal offence, which is committed when one, "with malicious intent to maim or disfigure," "cuts, slits or mutilates the nose or lip" of another. Pub. Sts. c. 202, § 19. The indictment has not used the words of the statute, but charges that, with such malicious intent, the defendant "a portion of the nose of the said Ann Blaney then and there feloniously and maliciously did bite off." Before the jury were empanelled, the defendant moved in the Superior Court that the indictment be quashed, on the ground that it did not properly set forth the offence described in the statute above cited. This motion was properly refused. Assuming, for the moment, that the aggravation was not well charged, yet the indictment contained every element of a formal and substantial charge of the crime of assault and battery. It was not therefore

defective by reason of failing to charge the defendant in due form with any offence. It could not have been quashed on motion, nor adjudged bad on demurrer. To such an indictment the Pub. Sts. c. 214, § 25, which require any objection for a formal defect apparent on its face to be taken by demurrer or motion to quash, alleging specifically the objections relied on, before the jury are sworn, do not apply. *Commonwealth v. Kennedy*, 131 Mass. 584.

For similar reasons, the defendant was not entitled, as he desired, to plead specially to the charge of assault and battery. He could, when judgment was to be rendered and sentence imposed, object to any sentence except for that crime, and was entitled then to be heard upon that subject. Whether found guilty by the verdict of the jury, or upon his own plea, he is found guilty of no more than that which the indictment legally charges.

These considerations dispose of the case, as now presented, upon the refusal of the presiding judge to grant the defendant's motions.

Exceptions overruled.

COMMONWEALTH vs. JOHN F. KEATING & others.

Suffolk. November 27. — 28, 1882. LORD & DEVENS, JJ., absent.

At the trial of an indictment against A. and B. jointly, for an assault upon a police officer while in the discharge of his duty, another officer testified that, on the morning after the assault, he went to B.'s house, and B. related to him where he had been the night before, and stated that he was with A. and another man; that, when they were on a certain street, A. was making a noise; that an officer came up to them and asked them to stop their noise; that A. made an offensive remark to the officer, who was about to arrest him, whereupon B. asked the officer to make some allowance for A. as he was intoxicated, and said that he would take A. home; that the officer then let them pass on, and they walked down the street; that, when they had gone a short distance, A. turned and struck the officer; and that, when he saw this, B. left. The conversation testified to took place in the absence of A. The judge admitted it as affecting B.'s connection with the assault only, and so ruled; but gave no specific direction to the jury in relation to the evidence. *Held*, that the evidence was competent against B.; and that A., not having requested an instruction limiting its effect, had no ground of exception to the admission of the evidence.

INDICTMENT against John F. Keating, Joseph H. Essam and John McCarty, for an assault on Lawrence Cain, a police officer, while in the lawful discharge of his duty, on March 26, 1882, at Boston.

At the trial in the Superior Court, before *Brigham, C. J.*, Joseph E. Palmer testified that he was a police officer; that in the morning of March 26, 1882, he went with other officers to the defendant Essam's house, on Bunker Hill Street; that they saw Essam's sister, who informed them that Essam had been out late the night before, that he was up-stairs, and she would call him down; that Essam came down-stairs, related to the witness where he had been the night before, and also stated that he was with the defendant Keating and a man they called Jack; that when they were on Chelsea Street, near Gray Street, Keating was making a noise; that an officer came up to them and asked them to stop their noise; that Keating made an offensive remark to the officer; that the officer was about to arrest Keating, whereupon Essam requested him to make some allowance for the man, as he was intoxicated, and said that he, Essam, would take Keating home; that the officer then let them pass on, and they walked down Gray Street, and, when down the street a little way, Keating turned and struck the officer; and that Essam, when he saw this, thought it was about time to leave.

This conversation took place between Palmer and Essam in the absence of Keating. So much of this testimony as related to Keating was objected to by him; but the judge admitted it, as affecting Essam's connection with the assault only, and so ruled; but, in charging the jury, no specific direction was given on this evidence.

The jury returned a verdict of guilty against Keating and Essam; and Keating alleged exceptions.

J. F. Dore, for Keating.

G. Marston, Attorney General, & *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. The only exception saved was to the admission of the conversation of the defendant Essam with officer Palmer. This evidence was clearly competent against Essam. It was admitted solely for the purpose of showing Essam's connection with the assault charged, and the judge so ruled. If the

defendant Keating wished the judge in his charge again to call the attention of the jury to the purpose of the evidence, he should have called the attention of the judge to it by requesting an instruction.

Exceptions overruled.

COMMONWEALTH vs. OWEN RAFFERTY.

Middlesex. November 27. — 28, 1882. LORD & DEVENS, JJ., absent.

At the trial of a complaint for maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, if the defendant relies upon a license as a justification, the burden is upon him, under the Pub. Sts. c. 214, § 12, to prove a license which is broad enough to authorize the acts complained of.

COMPLAINT to the First District Court of Eastern Middlesex, for keeping and maintaining a common nuisance, to wit, a certain tenement in Stoneham used for the illegal sale and illegal keeping of intoxicating liquors, on March 1, 1881, and on divers other days and times between that day and July 11, 1881.

At the trial in the Superior Court, before *Brigham*, C. J., the government proved sales of whiskey in said March, and sales of beer during the time covered by the complaint.

It was agreed by the government that the defendant had a license to sell liquors, which was in force on March 1, 1881, and expired on May 1, 1881; but there was no evidence as to which class of licenses it belonged.

The defendant asked the judge to instruct the jury, "that, upon this evidence, they had a right to presume and find that the license covered all sales made before May 1st, and the burden of proof and presumption shifted, and was then upon the government to satisfy them that the sales were in violation of law and not covered by the license."

The judge refused to give the instruction requested, and instructed the jury as follows: "It is agreed that the defendant had a license which expired on May 1st, but it is not agreed as to which class of licenses provided by law the defendant's license belonged. The burden of proving a justification of the sales of

intoxicating liquor, which have been put in evidence on the part of the Commonwealth, is upon the defendant. The fact of a license, without any evidence of the class of licenses to which that license belonged, does not in and of itself raise a presumption that the defendant had a license which authorized or justified him in making the sales in evidence."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

A. V. Lynde, for the defendant.

G. Marston, Attorney General, *& C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

C. ALLEN, J. Under the Pub. Sts. c. 214, § 12,* when acts apparently criminal have been proved in support of an indictment, and the defendant relies upon a license as a justification, the duty rests on him of proving a license which is broad enough to authorize the particular acts complained of. It is not sufficient for him to make it appear that he held some license; he must prove a license which is sufficient for his justification.

Exceptions overruled.

COMMONWEALTH vs. WARREN K. SNOW.

Middlesex, November 27. — 28, 1882. LORD & DEVENS, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors for sale in violation of law, it is sufficient, under the Pub. Sts. c. 100, § 27, for the government to prove that the defendant kept lager beer with intent to sell it unlawfully, without further proof that it was intoxicating, or that it contained more than three per cent of alcohol.

COMPLAINT to the District Court of Central Middlesex, alleging that the defendant, on September 23, 1881, at Concord, unlawfully kept intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth.

* "In all criminal prosecutions in which the defendant relies for his justification upon any license, appointment or authority, he shall prove the same; and, until such proof, the presumption shall be that he is not so authorized."

At the trial in the Superior Court, before *Brigham, C. J.*, it was in evidence that a quantity of bottled lager beer was found on the premises of the defendant. The question whether it was kept for sale was not contested by the defendant. The judge instructed the jury that it was sufficient evidence to convict, if it was proven to be lager beer and kept for illegal sale.

The defendant asked the judge to give the following instructions: "1. The jury must be satisfied that this beer was intoxicating, and, in order for it to be intoxicating, under the statutes, it must contain more than three per cent of alcohol, and, if it did not contain that amount, the jury must acquit. 2. The entire burden of proof is on the government to prove that this liquor was intoxicating, and, in order so to do, the government must prove that it contained over three per cent of alcohol." But the judge declined to give these instructions.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. W. Reed, for the defendant.

G. Marston, Attorney General, & *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. The Pub. Sts. c. 100, § 27,* did not change the existing laws upon the same subject. Under this section, it was sufficient for the government to prove that the defendant kept lager beer with intent to sell it unlawfully, without further proof that it was intoxicating, or that it contained more than three per cent of alcohol. Sts. 1875, c. 99, § 18; 1880, c. 239, § 5. *Commonwealth v. Curran*, 119 Mass. 206.

Exceptions overruled.

* "Ale, porter, strong beer, lager beer, cider, all wines, and any beverage containing more than three per cent of alcohol, by volume, at sixty degrees Fahrenheit, as well as distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter."

COMMONWEALTH vs. JOHN DAILY.

Norfolk. November 27. — 28, 1882. LORD & DEVENS, JJ., absent.

At the trial of a complaint for maintaining a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors, from April to July, a witness testified that, during that time, the defendant sold and delivered to him a glass of lager beer; and that the beer was taken from a bottle. The defendant testified that the beer sold to the witness was Berlin beer, and contained less than three per cent of alcohol; and that he had kept this same kind of beer down through August, and had kept no other kind of beer since said April. An officer testified, against the defendant's objection, that he went to the defendant's place of business in said August, in the evening, with a search warrant for intoxicating liquors; that, as he entered a certain room, some one put out the light; that he afterwards saw the defendant break a bottle in the room; that he also found a number of broken bottles in the room, but he did not know who had broken them; and that there was a smell of lager beer in the room where he saw the broken bottles. The judge instructed the jury, that if the defendant purposely broke a bottle containing the same kind of beer which he testified he had kept in his place of business from said April down through said August, to keep it away from the searching officer, this act might be considered as evidence bearing on the question whether the defendant thought the beer was intoxicating liquor. *Held*, that the defendant had no ground of exception.

COMPLAINT to the District Court of East Norfolk, on the Pub. Sts. c. 101, § 6, for keeping and maintaining a common nuisance, to wit, a certain tenement in Holbrook, used for the illegal sale and illegal keeping for sale of intoxicating liquors, on April 1, 1882, and on divers other days and times between that date and July 14, 1882.

At the trial in the Superior Court, before *Colburn, J.*, one Hobart testified for the government that the defendant, on May 28, 1882, sold and delivered to him a glass of lager beer; that the beer was taken from a bottle, and the bottle from a barrel.

The defendant testified that the beer sold to Hobart was Berlin beer, and contained less than three per cent of alcohol; and, on cross-examination, testified that he kept this same kind of beer down through August 1882, and had kept no other kind of beer since April 1, 1882.

The government then called an officer, who testified, against the defendant's objection, that he went to the defendant's place of business in said August, in the evening, with a search warrant for intoxicating liquors; that, as he entered a certain room,

some one put out the light; that he afterwards saw the defendant break a bottle in the room; that he also found a number of broken bottles in the room, but he did not know who had broken them; and that there was a smell of lager beer in the room where he saw the broken bottles.

The defendant asked the judge to instruct the jury to disregard this evidence; but the judge refused, and instructed the jury that if the defendant purposely broke a bottle containing the same kind of beer which he testified he had kept in his place of business from said April 1st down through said August, to keep it away from the searching officer, this act might be considered as evidence bearing on the question whether the defendant thought the beer was intoxicating liquor.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

G. Marston, Attorney General, *vs.* *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

C. ALLEN, J. The various facts testified to by the officer, when taken together, were competent evidence, and were submitted to the jury under instructions sufficiently favorable to the defendant.

Exceptions overruled.

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COMMONWEALTH *vs.* WILLIAM KINSLEY.

Worcester. Oct. 3. — Dec. 2, 1882. LORD, *C. ALLEN & COLBURN, JJ.*, absent.

The Gen. Sts. c. 88, § 60, as amended by the St. of 1880, c. 94, providing that a license, granted to a person to keep a table for playing at pool for hire, "may be revoked at the pleasure of the authority granting it," is constitutional.

A licensee of a table kept for playing at pool for hire is liable, under the St. of 1880, c. 94, to the penalty prescribed by the Gen. Sts. c. 88, § 70, if he allows such table to be used for hire on his premises, after he has been informed, by the clerk of the town whose selectmen granted the license, of the contents of a certificate of a vote of the selectmen revoking the license, although he had no notice of their intention to revoke it; and the St. of 1876, c. 147, does not apply.

FIELD, J. The defendant was complained of for unlawfully keeping, in a building occupied by him in Millbury, a table for the purpose of playing at pool for hire, gain and reward, without authority or license therefor.

By the Gen. Sts. c. 88, §§ 69-72, as amended by the St. of 1880, c. 94, the selectmen in towns are authorized to grant licenses for such a table, but "such license may be revoked at the pleasure of the authority granting it;" and all persons are prohibited, under a penalty, from keeping such a table without a license.

A license had been duly granted to the defendant, and it had been revoked by the selectmen without giving him notice of their intention to revoke it; but they had given the town clerk a certificate of the vote revoking the license, and he had informed the defendant of its contents, and thereafterwards the defendant "allowed a pool table to be used for hire upon his premises." The defendant contends that this revocation was inoperative, because it was made without giving him an opportunity to be heard; and that, if the statutes purport to authorize a revocation without notice, they are in this respect unconstitutional and void.

The keeping of a pool table for hire is one of many things affecting the public morals, which the Legislature can either absolutely prohibit or can regulate, and one common form of regulation is by requiring a license. A licensee takes his license subject to such conditions as the Legislature sees fit to impose, and one of the statutory conditions of this license was that it might be revoked by the selectmen at their pleasure. Such a license is not a contract, and a revocation of it does not deprive the defendant of any property, immunity or privilege within the meaning of these words in the Declaration of Rights, art. 12. *Commonwealth v. Blackington*, 24 Pick. 352. *Calder v. Kurby*, 5 Gray, 597. *Commonwealth v. Colton*, 8 Gray, 488. *Commonwealth v. Brennan*, 103 Mass. 70. *Commonwealth v. Adams*, 109 Mass. 344. *Commonwealth v. Fredericks*, 119 Mass. 199.

It is immaterial in what manner the defendant obtained knowledge that his license had been revoked. Without considering whether the defendant would be liable to the forfeiture imposed by the Gen. Sts. c. 88, § 70, if he had not had either

notice or knowledge that his license had been revoked, after such knowledge he would clearly be liable. The St. of 1876, c. 147,* has no application to this case. *Exceptions overruled.*

J. Hopkins, for the defendant.

G. Marston, Attorney General, *f* *C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

COMMONWEALTH vs. ANN GORMLEY.

Middlesex. Nov. 27. — Dec. 2, 1882. LORD & DEVENS, JJ., absent.

An allegation in a complaint of a sale of intoxicating liquor to T. C. is supported by proof of a sale to T. F. C., if he was the person named in the complaint as the person to whom the sale was made, and was as well known by the one name as by the other.

An allegation in a complaint of an unlawful sale of intoxicating liquor to C. is supported by proof of a sale to C., although C., in making the purchase, was acting as the agent of D., if he did not disclose the fact that he was buying the liquor for D. or for some other person.

The fact that, at the time of an unlawful sale of intoxicating liquor by a married woman, her husband was lying sick upon a bed in a room adjoining that in which the sale took place, the door between the rooms being open, does not raise a conclusive presumption of law that she was acting under his coercion.

COMPLAINT alleging that the defendant, at Somerville, on October 30, 1881, unlawfully sold to Thomas Casey one gill of whiskey. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

Casey, a boy under twelve years of age, was called as a witness by the government, and testified that his name was Thomas F. Casey; that, on the day in question, he was furnished with money by one Mary Daley, and told to go to the shop kept by Andrew Gormley in the dwelling-house occupied by himself and

* This statute provides that licenses granted to keepers of billiard saloons, under the Gen. Sts. c. 88, shall be signed by the clerk of the city or town in which they are granted, shall be recorded by him, and shall continue in force until the first day of May next ensuing, unless sooner revoked; and that, when revoked, the clerk of the city or town shall give written notice of such revocation to the holder of the license.

his wife, the defendant, and purchase one gill of whiskey and some cakes; that he went to the shop and found the defendant there, and told her that his mother, who it appeared was accustomed to buying goods there, had sent him for one gill of whiskey and some cakes; and that the defendant delivered to him the whiskey and cakes, and he paid her twelve cents for them, and carried them to Daley.

Mary Daley was also called by the government as a witness, and testified that she sent Casey for the whiskey and cakes, and gave him the money to pay for the same; that he brought the whiskey to her, and that she carried it to the police and caused this complaint to be made.

There was evidence on the part of the defendant that her husband was in the house, in a room adjoining the shop, when the sale to Casey took place, sick upon a bed; and that the door between the shop and room was open.

The defendant asked the judge to rule as follows: "1. There is a variance between the name of the purchaser of the liquor, as alleged, and the name proved, and the defendant cannot be convicted. 2. The evidence in the case will not support the allegation of a sale to Casey, inasmuch as it appeared that his statement to the defendant that his mother had sent him for the whiskey was enough to show that he was acting as agent and not as principal in making the purchase. 3. If the jury should be satisfied, from the evidence in the case, that the defendant made a sale of intoxicating liquor as alleged, yet, if such sale was made in a house occupied by herself and her husband as their dwelling-house, and with his approval and in his presence and under his directions, she cannot be held liable. 4. If the sale was made in such house, and under the general directions of the husband, although he was at the time in an adjoining room, she cannot be held liable."

The judge gave the third ruling requested; declined to give the others; and instructed the jury as follows: "If the defendant made the sale alleged, not in the presence or with the knowledge of her husband, or when he was in a situation to exercise, or exercising, any control or influence over her in the matter of the sale, the defendant may be convicted of a sale to Thomas F. Casey, if he was the person named in the complaint as the

person to whom the defendant made an unlawful sale, notwithstanding he is styled in the complaint Thomas Casey, provided that person was as well known and called by the name of Thomas Casey as by the name of Thomas F. Casey, if, in making the purchase, Casey, although acting therein as the agent of Mary Daley, did not disclose the fact that he was buying the liquor for Mary Daley, or for some other person."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

I. S. Morse & G. A. Morse, for the defendant.

G. Marston, Attorney General, *& C. H. Barrows*, Assistant Attorney General, for the Commonwealth.

FIELD, J. The first exception was not argued, and the instruction that the "defendant may be convicted of a sale to Thomas F. Casey, if he was the person named in the complaint, as the person to whom the defendant made an unlawful sale, notwithstanding he is styled in the complaint Thomas Casey, provided that person was as well known and called by the name of Thomas Casey as by the name of Thomas F. Casey," was correct. *Commonwealth v. O'Hearn*, 132 Mass. 558. *Commonwealth v. Desmarteau*, 16 Gray, 1, 17. *Commonwealth v. Shearman*, 11 Cush. 546.

The exceptions do not purport to set out the whole evidence, and we cannot say that the court should have given the second ruling asked for. *Gunnison v. Langley*, 3 Allen, 337. The instruction given, that the defendant may be convicted "if, in making the purchase, Casey, although acting therein as the agent of Mary Daley, did not disclose the fact that he was buying the liquor for Mary Daley, or for some other person," was correct. *Commonwealth v. Kimball*, 7 Met. 308. *Commonwealth v. Remby*, 2 Gray, 508. *Commonwealth v. McGuire*, 11 Gray, 460.

If it was the intention of the defendant to raise the question whether the defendant could be found guilty if the jury should find that Casey did state to her, at the time of the sale, that he was buying the whiskey for his mother, and also find that in fact he was not buying the whiskey for himself but for Mary Daley, another person, we are of the opinion that the exceptions do not show that this question was distinctly presented to the presiding justice of the Superior Court, or was passed upon by him.

The instructions given upon the presumed coercion by the husband were sufficiently favorable to the defendant; and the fourth ruling requested was rightly refused. Whether there is any crime, which, if committed by a wife in the actual presence of her husband, is conclusively presumed, in favor of the wife, to have been committed by his coercion, need not be discussed. The evidence was that the husband was in an adjoining room, "sick upon a bed, and that the door between the shop and room was open." Under such circumstances, there is no conclusive presumption of law that she, in selling intoxicating liquor, was acting under the immediate influence and control of her husband. 1 Russ. on Crimes, 41. *Exceptions overruled.*

DOLPHUS LAMONT vs. WILLIAM FULLAM & another.

Worcester. Oct. 4. — Dec. 2, 1882. LORD, C. ALLEN & COLBURN, JJ., absent.

If two persons enter into an arrangement, by which one is to furnish a yard and put it in order for manufacturing bricks, and the other is to furnish the materials and labor for making the bricks, which are to be divided between them when made, but there is no agreement to share the profits and losses of the business, they do not become partners even as to third persons.

CONTRACT, against William Fullam and F. G. Zeigler, described in the writ as "late copartners in business," upon an account annexed, for work and labor. Trial in the Superior Court, without a jury, before Knowlton, J., who allowed a bill of exceptions, in substance as follows:

Zeigler was defaulted; and it was admitted that the action could not be maintained against Fullam, unless it could be shown that, as to third parties, there was a partnership existing between him and Zeigler at the time the labor was performed by the plaintiff.

The plaintiff testified in substance as follows: "I work in a brickyard. I worked for the defendants in June 1881. The balance due me is \$25.08, for fourteen and a half days' labor. Zeigler engaged me to work there. Fullam was there very

often. He had a good deal to say about the business. He had three horses there and a man. He gave direction to the help about the work. Sometimes he came two or three times a week, sometimes only once. I have seen him around the kiln, and he always said he wanted the bricks set pretty good. I have seen him give them an order to come after some brick. I have seen him furnish some money to pay for the help." On cross-examination he testified: "At the time of hiring, Zeigler said nothing about working for any one else than himself. He told me what to do. I worked till Zeigler ran away. He paid me on the fifteenth of every month, that was what the agreement was; he gave me \$20 on June 19, and \$24 on July 16, making \$44 in all. I was to have \$2 per day and board. After he left, I did not make a bargain about working, and continued on working for Fullam. While Zeigler was there, Fullam told me to set the bricks good. I saw Fullam give Zeigler money to pay the help on July 16, at Zeigler's house. I saw Fullam's team come down to get bricks. Never saw him come himself."

Fullam was called by the plaintiff, and testified as follows: "At the time the plaintiff worked there, I owned one half of the brickyard; I and my son bought it in February 1881. We never expected to manufacture bricks there. Zeigler gave the deed to me. It was a foreclosure sale. He had been there two years, and had manufactured bricks there two years. He came to me and wanted to make arrangements for making bricks. We told him if he wanted to hire the yard he could. He said he had not the money to put the yard in condition. We told him that, if we could put it into condition so that he could go on and manufacture as he had been doing, and give us a share of the brick for it, he might have it. He wanted it put into condition to make machine brick, which he thought could be done for \$600. We estimated it at \$1000. He proposed to us that, if we would furnish him the house and the yard, and firewood for burning the bricks, three horses, and one man to grind clay, he would take the yard and furnish all the labor and pay his own help and give us half the bricks. We agreed to this arrangement. After this bargain was made, he came to me and said that he had some little money of his own, but did not think that

he had enough, and should need some to pay his help along until he got his part of the first kiln of bricks into the market. We asked him how much he thought he should need. He answered about \$800. We told him we would lend him that amount, and he might pay us when he sold his half of the bricks. He worked fixing up the yard till about the middle of May, and I paid him for his work, and took his receipt. I had no men in the yard. I had one man and a horse working there after he began making bricks, but at night the man came home. He began manufacturing about the middle of May. Some time in the month of June, he burned a kiln of bricks. About the middle of June, he came to us, and we lent him \$350, and took his receipt. On July 1, we lent him \$50 more. About the middle of July, he said he had had bad luck and wanted \$400. We let him have some money, less than that, and took a bill of sale from him of one undivided half of the bricks. I did not know a single man of all those that he hired. I was not a brickmaker. After the yard was finished, I went there occasionally. Zeigler sold some of his bricks, and I sold mine. He did not sell any of my bricks. His contract was not complete until he had counted out to me in the yard one half of the bricks. I never authorized Zeigler to use my name in any way in the business, and never heard that he did. I do not think that he did use it. I never thought of a partnership between us, and nothing was ever said about one. My son is in partnership with me in the carpenter business, and we together owned the brickyard premises. After we let Zeigler have the last money, and took his bricks, he ran away, and we have not seen him since."

There was evidence in the case that Zeigler had failed in business at some time before this arrangement. It appeared that, up to this time, the business of manufacturing had been going on from the time it began, and there were bricks in the yard in all stages of the process of manufacture; that, from the time of taking the bill of sale, Fullam continued the business of manufacturing on his separate account from the point where Zeigler left it, and disposed of the bricks which he had completed and the material which he left in the process of manufacture; and there was no evidence that any division or counting out of the bricks ever occurred between the parties.

On this evidence, Fullam asked the judge to rule that the relationship of Fullam and Zeigler did not in law constitute a partnership as to third persons. The judge declined so to rule; and found as facts that each of the defendants agreed with the other to furnish, and pay for on his own account, those things which he undertook to contribute for the purpose of carrying on the manufacture of bricks; that Zeigler agreed to furnish and pay for all the labor except that of one man who worked with a horse; that, under the contract between the parties, it was the duty of Zeigler to pay the plaintiff from his own private funds; that Fullam did not intend to make himself liable for debts contracted for those things which Zeigler had agreed to furnish, but that he and Zeigler agreed to share equally the profits of the business; that these profits were to come in the form of manufactured bricks; and that both parties intended and arranged that their interest and ownership in the bricks should be equal; and, upon these facts, found for the plaintiff against the defendant Fullam for the amount claimed. Fullam alleged exceptions.

H. W. King, for Fullam.

C. L. Gardner, for the plaintiff.

BY THE COURT. Upon the evidence as reported to us, we are of opinion that the finding in favor of the plaintiff against the defendant Fullam cannot be sustained. There was no evidence that Fullam held himself out to the plaintiff as a partner of Zeigler. If the arrangement between the defendants was that Fullam was to furnish the yard and put it in order for manufacturing bricks, and Zeigler was to furnish the materials and labor for making the bricks, which were to be divided between them when they were made, this did not make them partners. *Holmes v. Old Colony Railroad*, 5 Gray, 58. The essential element of an agreement to participate in the profits and losses is wanting. We are not able to see any evidence to justify a finding that they agreed to share the profits and losses of the business, and therefore are of opinion that the plaintiff is not entitled to judgment against Fullam. *Pratt v. Langdon*, 97 Mass. 97.

Exceptions sustained.

JOHN R. WILLIAMS, executor, *vs.* BENJAMIN B. WILLIAMS.

Worcester. Oct. 4. — Dec. 2, 1882. LORD, C. ALLEN & COLBURN, JJ.,
absent.

A. brought an action of contract against B., who filed an answer containing a general denial, and also filed a declaration in set-off. Subsequently B. was defaulted, and judgment was rendered against him on his default for more than \$1000 and costs. He then brought a writ of review, and, upon the trial, A. recovered a verdict of one dollar. *Held*, that, under the Pub. Sts. c. 187, §§ 34, 35, B. was entitled to costs, even if the sum recovered by A. in the original action was reduced by set-off upon the trial on the review.

MORTON, C. J. Benjamin B. Williams brought an action of contract against Marshall Williams; the defendant filed an answer containing a general denial, and also filed a declaration in set-off. Subsequently he was defaulted, and judgment was rendered against him on his default for \$1398.83, and costs. Marshall Williams then brought this writ of review, and, upon the trial, Benjamin B. Williams, the original plaintiff, recovered a verdict of one dollar. Upon these facts, the Superior Court rightly ruled that the plaintiff in review was entitled to costs. The whole subject of costs upon writs of review is regulated by the Pub. Sts. c. 187, which is a reenactment and continuation of the provisions of law in force when this action was tried. By § 34, it is provided that "the prevailing party shall recover costs, unless the court in granting the review imposed on the petitioner terms respecting costs." Section 35 provides that, "if the sum recovered by the plaintiff in the original suit for debt or damages is reduced on the review, the original defendant shall have judgment and execution for the difference, with costs."

A review is a new action, and the party who obtains in it a result more favorable to him than that of the original action is the prevailing party. *Williams v. Hodge*, 11 Met. 266. *New Haven & Northampton Co. v. Northampton*, 102 Mass. 116, 122. By the language of the statute, the plaintiff in review in this case is entitled to his costs, and it does not seem to admit of any other construction.

The defendant in review contends that, as the sum recovered by him in the original suit was reduced by set-off upon the trial on the review, the statute does not apply. We doubt

whether this question is properly before us. It does not appear that the sum established by him was reduced by set-offs, and therefore it does not appear that this question was ruled upon by the Superior Court. The record of the case shows that a large part of his claim was disallowed because he failed to prove it. *Williams v. Williams*, 131 Mass. 538. Whether he proved any part of his claim beyond the sum of one dollar, and whether the amount thus proved was reduced by set-off, does not appear. There is no presumption from the record before us that this was so. The plaintiff in review may have abandoned his set-off, and offered no proof of it. The proper course for the defendant in review was to present the question to the Superior Court, which was cognizant of the course of the trial and of the facts, and obtain a ruling, and, if it was adverse, to file exceptions.

But as both parties have argued the question as the one intended to be presented, we have considered it, and are of opinion that the ground taken by the defendant in review is not tenable.

In other parts of the statutes, careful provision is made as to what shall be the effect upon costs if the plaintiff's claim is reduced by set-offs, it being provided that, although, as the general rule, if a plaintiff brings his action in the Superior Court and recovers a sum as debt or damages not exceeding twenty dollars, he shall recover no costs, yet this rule shall not apply if his claim as established at the trial exceeds twenty dollars, and is reduced to that amount or less by set-offs. Pub. Sts. c. 198, §§ 5, 7.

If the Legislature had intended that a similar exception should apply in the statutes we are considering, it would certainly have been expressed. The fact that no such exception is expressed is strong, if not conclusive, evidence that it intended that a reduction of the claim of the original plaintiff by set-offs should have the same result as a reduction in any other mode. It is not unlikely that the Legislature may have deemed the rule it established to be, as intimated in *Williams v. Hodge*, *ubi supra*, a salutary check upon parties who obtain judgment by default, and file their claims in disregard of the counter claims of the other party, as they do this under the penalty of paying costs,

if, upon a review, these counter claims are shown to be justly due.

Judgment affirmed.

G. A. Torrey & S. Haynes, for the defendant in review.

J. H. Dean, for the plaintiff in review.

MEMORANDUM.

On the eighth day of December 1882, the Honorable OTIS P. LORD resigned the office of justice of this court, which he had held since the twenty-first day of December 1875.

FRANK W. ROSWELL vs. EDWARD J. LESLIE.

Essex. Nov. 8. — Dec. 28, 1882. C. ALLEN & COLBURN, JJ., absent.

In an action for an injury done by a dog to a child four years and eleven months old, in which facts tending to show a shock to his nervous system have been testified to, evidence is admissible that, ever since his injury, he has shown signs of fright and excitement at the sight of any dog.

TORT, under the Gen. Sts. c. 88, § 59, to recover double the amount of damage sustained from the bite of a dog on November 15, 1880. At the trial in the Superior Court, before *Wilkinson, J.*, the jury returned a verdict for the plaintiff in the sum of \$100; and the defendant alleged exceptions, which appear in the opinion.

H. F. Hurlburt, for the defendant.

W. H. Niles & G. J. Carr, for the plaintiff.

DEVENS, J. The plaintiff, at the time of the injuries alleged to have been received from a dog of the defendant, was a child of four years and eleven months old. His father was allowed to testify to various facts tending to show a shock to the nervous system of the plaintiff; and also, against the defendant's objection, that, ever since the plaintiff was bitten, he had shown, in various ways described by the witness, signs of fright and excitement at the sight of any dog. The plaintiff was entitled to

recover, among other things, for any injury to his nervous system, or for any loss in his mental or physical capacity. *Ballou v. Farnum*, 11 Allen, 73. *Tyson v. Booth*, 100 Mass. 258. *Coleman v. New York & New Haven Railroad*, 106 Mass. 160. This evidence bore directly upon the question as to the condition in which the plaintiff was subsequently to the bite, and it was proper to be considered by the jury in determining whether and to what extent he had been injuriously affected thereby.

Exceptions overruled.

INDEX.

ACCEPTANCE.

See ORDER.

ACCOUNT.

See EQUITY, 8.

ACCOUNT ANNEXED.

See PLEADING, 1, 3, 4; WORK AND LABOR, 2, 3.

ACTION.

1. Where a statute authorizes a work for public use, and the work is executed in a reasonably proper and skilful manner, any damage necessarily caused to any person by taking his property can be recovered only in the manner pointed out by the statute. *Hull v. Westfield*, 433.
2. An action cannot be maintained against a railroad corporation for personal injuries occasioned to a brakeman in its employ, by falling from a moving train, and resulting in death, if the evidence wholly fails to show how he fell, what he was doing at the time, whether his death was instantaneous, or whether he endured any conscious suffering before his death. *Corcoran v. Boston & Albany Railroad*, 507.
3. If a grantee, in consideration of the conveyance of land, agrees to support the grantor during his life, and breaks the contract, the grantor may maintain an action to recover damages for the breach, and is not obliged to declare for the value of the land. *Lyman v. Lyman*, 414.
4. To maintain an action for breach of a contract to pay for certain goods purchased by the plaintiff for the defendant, if the goods are sent to a third person, the plaintiff must show either that such person was the agent of the defendant to receive the goods, or that some delivery or offer to deliver was made to the defendant by such person or by some one in behalf of the plaintiff. *McKinney v. Wilson*, 131.
5. A mortgagor, who has conveyed his equity of redemption, but remains personally liable upon the mortgage note, and who has been compelled to pay the balance due thereon, after the proceeds of a sale by the mortgagee

- under the power of sale contained in the mortgage have been applied upon the note, may maintain an action against the mortgagee for misconduct in conducting the sale, by reason of which a smaller sum was obtained than otherwise would have been. *Fenton v. Torrey*, 138.
6. A mortgagee of personal property may maintain an action for conversion, without proof of a demand and refusal, against an officer who sells the mortgaged property on an execution against the mortgagor, although the mortgagor was the purchaser at the sale, and then received and has since retained the possession of the property; and the measure of damages is the same as if the purchaser had been a stranger. *Leonard v. Hair*, 455.
 7. If an officer levies an execution on personal property which is subject to a mortgage, and afterwards sells the same on the execution, it is no defence to an action against him by the mortgagee for conversion, that after the seizure and before the sale he attached the property on a writ in favor of a third person, and the mortgagee made no demand upon him for the property. *Id.*
 8. A creditor of a mortgagor of personal property caused it to be attached while in the possession of the mortgagor on a writ in which the mortgagee was summoned as trustee, under the Gen. Sts. c. 123, § 67. The mortgagee filed a general answer, denying that he had any goods or credits of the defendant in his possession, but not disclosing his mortgage, and was thereupon discharged by the court, without objection by the creditor and without being further examined. The attaching officer duly sold the goods on mesne process before the trustee was discharged, and, after said discharge, the officer levied an execution issued in said action upon the proceeds of the sale, and paid them over to the creditor. *Held*, that the discharge of the trustee operated as a dissolution of the attachment; and that the mortgagee might maintain an action against the attaching officer for the proceeds of the sale. *Held, also*, that it was no defence that the defendant had made a second attachment of the same property on a writ in favor of another creditor of the mortgagor in an action in which the mortgagee was summoned as trustee, which action was pending at the time the present action was brought, and in which the trustee had not been charged or discharged. *Goulding v. Hair*, 78.
 9. A. delivered a quantity of hides to B. to be by him tanned, curried and sold; and, out of the proceeds derived from the sale, B. was to pay A. a certain sum, at which the hides were charged to B., and to retain the balance of the proceeds of the sale for his labor on the hides and for his services in selling the same. Until thus tanned, curried and paid for, the title to the hides was to remain in A. B. died before the process of tanning and currying was completed, and A. immediately took possession of the hides and completed this process and sold them for a sum stated, which was their value at the time A. took possession of and sold them. *Held*, in an action by B.'s administrator against A., that the contract between A. and B. was not so personal in its character that it was determined by the death of B.; and that the administrator was entitled to recover only the difference between the amount at which the hides were

charged to B. and the amount realized from the sale by A. *White v. Allen*, 423.

See CITY, 1; CONTRACT, 6; DAMAGES, 5; DECEIT; GAMING; GUARDIAN AND WARD; INTOXICATING LIQUORS, 12-14; MASTER AND SERVANT; PLEADING, 6; PROMISSORY NOTE, 5; REWARD; SAVINGS BANK, 2, 3; SCHOOL; TROVER; WORK AND LABOR.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

See EVIDENCE, 6; USE AND OCCUPATION, 2.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALTERATION OF INSTRUMENTS.

1. In an action upon a promissory note, if it appears that the note has been materially altered since its delivery, and the plaintiff proves that the note has never rightfully or to his knowledge been in the possession of any one but himself and his agent, and that the alteration was not made by him or by his agent, or with the knowledge or consent, directly or indirectly, of either of them, he is entitled to recover on the note as originally written, although he is unable to prove the circumstances of its alteration. *Drum v. Drum*, 566.
2. In an action upon a promissory note, which has been altered since its delivery, if its original tenor is apparent on inspection, it is sufficient to declare upon it in the usual form; and, upon showing that the alteration is a mere spoliation, there is no variance between the allegation and the proof. *Ib.*

AMENDMENT.

1. If an administrator sells, under the Gen. Sts. c. 98, § 4, to A. a claim due to the estate of his intestate from B., and then brings an action against B., in his own name, as administrator, for the benefit of A., it is within the discretion of the Superior Court to allow the writ to be amended by striking out the name of the administrator, and inserting that of A. as plaintiff. *Buckland v. Green*, 421.
2. A petition to the mayor and aldermen of a city, for the assessment of damages occasioned to the petitioner's land by the construction of a drain, contained no reference to any statute, except that it prayed that the damages should be assessed and paid over according to the provisions of a

certain statute. *Held*, on a petition to the Superior Court, for the assessment of damages, in the nature of an appeal from the action of the mayor and aldermen, that the court had power to allow the petition to be amended, if the petitioner could maintain the petition under any statute applicable to the proceedings. *Porter v. Newton*, 56.

See SUPERIOR COURT, 2.

ANSWER.

See PLEADING, IV.

APPEAL.

1. An objection to a declaration, not specified in a demurrer thereto, is not open at the hearing in this court on appeal. *Smith v. Milton*, 369.
2. No appeal lies from a judgment of the Superior Court in favor of the petitioner, on a petition by a widow to have land of her late husband set off to her under the Gen. Sts. c. 90, § 15, and the St. of 1861, c. 164, § 1, or under the St. of 1880, c. 211, there being no final judgment in the case. *Elliot v. Elliot*, 555.

See JURISDICTION; POOR DEBTOR, 1; SEWER, 1.

AQUEDUCT.

See EQUITY, 3.

ARREST.

See ESCAPE.

ARREST OF JUDGMENT.

See COMPLAINT, 1.

ASSAULT.

1. A parent, to whom the custody of his child has been awarded upon the termination of a divorce suit, may be convicted of an assault and battery, if, in endeavoring to effect an entrance into a house in which the child has been placed, for the purpose of obtaining possession of the child, he uses intentional force upon the person of the occupant of the house, in order to overcome resistance by the latter to his entrance. *Commonwealth v. Beals*, 396.
2. If a tenant at will surrenders the premises by an express agreement with the owner, and vacates them with his family and goods, leaving behind a person who has occupied the premises with him by his permission, but without the owner's knowledge or consent, the owner is not liable to an action for an assault, if he ejects such person, after request and refusal to leave the premises, using no unreasonable force. *Stone v. Lahey*, 426.

See CORPORATION, 4; EXCEPTIONS, 13; INDICTMENT.

ASSESSMENT.

See BETTERMENT.

ASSIGNMENT.

1. Two debtors made an assignment of all their property in trust, for the security of new notes to be given by them to such of their creditors as should become parties to the assignment within two months from the date thereof. By the terms of the assignment each creditor was to receive four new notes, payable at different times, the last being payable in thirty months, and covenanted not to sue his original demand except on default in the payment of the new notes. The trustees paid only a dividend on the new notes. After the last of the new notes matured and one debtor had received a discharge in bankruptcy and the other had ceased to be a resident of this Commonwealth, a creditor brought a bill in equity seeking to become a party to the assignment. *Held*, that, although the trustees had funds sufficient to pay him the same dividend which the creditors who signed had received, and although he had accidentally failed to be a party to the assignment, and would have been one had he known of it in time, the bill could not be maintained. *Easton Bank v. Smith*, 26.
 2. After a railroad corporation had filed a location of its railroad over A.'s land, A. conveyed a portion of the land to B. by a warranty deed containing a covenant against incumbrances. Both A. and B. filed petitions against the corporation for the assessment of damages for the land taken; and, B. having become insolvent, his assignee assigned to the corporation the claim of B. under his petition for the land taken and damages caused by the laying out of the railroad, with full power to prosecute the petition to final judgment, and to avail itself of all remedies both in law and in equity in relation to said claim. A. subsequently recovered judgment against the corporation for damages for all the land taken. *Held*, on a bill in equity by the corporation against A., to restrain him from enforcing his judgment so far as the damages sustained by B.'s land were concerned, that the claim of B. against A. for breach of the covenant of warranty did not pass by the assignment to the corporation; and that the bill could not be maintained. *New York & New England Railroad v. Drury*, 167.
 3. An assignment of all sums that may become due from the city to the assignor on or before a future day named, for services as janitor of a public school building, which position he has held for several years by virtue of an annual election by a committee on public property of the city, is ineffectual, as against the trustee process, to pass to the assignee sums earned before that day, but under a subsequent appointment as janitor, there being no agreement for such subsequent appointment at the time of making the assignment; although the terms of his subsequent appointment are similar to that which preceded it, and a custom prevails in that city by which he would have been entitled to keep his employment until a successor was chosen. *Eagan v. Luby*, 543.
- See DEED, 2; EXCEPTIONS, 15; MORTGAGE, 2; TRUST AND TRUSTEE, 4.

ASSUMPSIT.

See WORK AND LABOR.

ATTACHMENT.

See ACTION, 8; BOND, 2, 3; CORPORATION, 3; INSOLVENT DEBTOR, 3;
TRUST AND TRUSTEE, 2-3.

ATTORNEY AND COUNSEL.

See CORPORATION, 4.

AUDITOR.

An auditor's report is *prima facie* evidence of the facts found by it, and, if not met or controlled by the party against whom they are found, will authorize the jury in finding those facts as found by the report. *Phillips v. Cornell*, 546.

See EXCEPTIONS, 1, 7; JUDGMENT; PRINCIPAL AND AGENT, 2.

BANK.

Interest received by a national bank upon a promissory note, greater than the rate allowed by the laws of the State where the note was made, in violation of the U. S. Rev. Sts. § 5197, cannot be set off, in an action by the bank upon the note, against the amount due thereon; but the bank is entitled to recover only the face of the note, without interest. *Peterborough Bank v. Childs*, 248.

See CORPORATION, 3.

BANKRUPT.

See DEED, 2.

BASTARD.

The Gen. Sts. c. 72, providing for the maintenance of bastard children, does not apply to the case of a child which is still-born, and which, if born alive, would be a bastard. *Schramm v. Stephan*, 559.

BETTERMENT.

The St. of 1875, c. 185, authorized a board of park commissioners to locate and lay out within the city of Boston a public park, to take such lands as the board should deem desirable therefor, and to assess upon any real estate in Boston, which, in the opinion of the board, should receive any benefit and advantage from such locating and laying out, beyond the general advantages to all real estate in the city, "a proportional share of the expense of such location and laying out," the entire amount so assessed upon any estate not to exceed one half of the amount adjudged by the

board to be the whole benefit received by it. The board purchased a large tract of flats, over part of which the tide flowed, the rest being marsh, and proceeded to lay out avenues and to fill them with gravel; and, when but a small portion of the area was filled, and none of the avenues were completed, passed an order declaring that they had taken, and did thereby take and create, as a public park, certain land, being in fact that already purchased, and also passed a further order reciting that, whereas by the previous order a park was located and laid out, they laid an assessment upon certain lands benefited thereby. This assessment was in fact less than the sums which had then been expended for the purchase of the land and for the filling already done. *Held*, on a petition for a writ of certiorari, by the owners of estates so assessed, to quash the assessment, that the park was laid out, within the statute; and that the court could not say, as matter of law, that the estates of the petitioners had not been benefited by what had been done at the time the assessment was made. *Foster v. Park Commissioners*, 321.

BILL OF LADING.

1. The transfer and delivery of an inland bill of lading of goods, by the consignee to a person who advances money upon them, is not in form or effect a mortgage, but vests in such person a property in the goods, which entitles him to maintain an action against one who wrongfully converts them. *Forbes v. Boston & Lowell Railroad*, 154.
2. A delivery of an inland bill of lading for a valuable consideration is in law the delivery of the property itself; and it is not necessary for the person to whom it is delivered to take possession of the property upon its arrival, or to give notice to the carrier or warehouseman who has the actual possession of the property. *Id.*
3. By the usual course of business in forwarding grain from C. to B., it is sent by water from C. to an intermediate point, and is thence taken by railroad to B. A bill of lading is given at C., making the grain deliverable to the shipper at the intermediate point, and there a railroad receipt is given, with a memorandum upon it showing that the grain was received from a vessel, and that a bill of lading is outstanding. The bill of lading is regarded as transferring the property, and is alone used in procuring the goods from the carrier at B. *Held*, that the bill of lading is the representative of the grain during the whole of the transit from C. to B. *Forbes v. Fitchburg Railroad*, 154.

See TROVER, 1; USAGE.

BOARD OF HEALTH.

See CITY, 2; INFORMATION, 2.

BOND.

1. The sureties on a general bond given by an executor, who has also given a special bond with sureties to account for, and dispose of according to law,

the proceeds of a sale, under a license of the Probate Court, of the real estate of his testator, remaining after payment of debts, legacies and charges of administration, are not liable for the neglect of the executor to pay over to the residuary legatees entitled thereto the balance of the proceeds of such sale, although the executor charges himself in his general account with the whole of such balance. *Robinson v. Millard*, 236.

2. A bond to dissolve an attachment, duly executed by a third person, who receives the property attached, by which he agrees to pay the amount of any judgment which may be recovered by the creditor in the action in which the attachment was made, is given upon sufficient consideration, and is valid, although it does not contain the condition required by the St. of 1875, c. 68, § 2. *Central Mills v. Stewart*, 461.
3. If an action is brought against A. and B. jointly, and process is served only upon A. and his property alone attached, and a bond is given by a third person to dissolve the attachment, in which the action is described as against A. alone, and the condition is to pay any judgment that may be recovered in that action, and judgment is rendered against A. alone, the bond sufficiently identifies the action. *Ib.*

See EQUITY, 11; JURISDICTION; PROBATE COURT.

BOUNDARY.

See EVIDENCE, 3-5.

BRIDGE.

See RAILROAD, 1.

BROKER.

The defendant employed the plaintiff as a real-estate broker to sell his estate. The plaintiff rendered some services in attempting to sell the estate to P., who at one time thought of buying it, but abandoned the idea. A subscription was raised for the purpose of preserving the building standing on the estate as an historical monument. A committee of the subscribers employed C. as their agent, and he entered into negotiations for the property which resulted in an agreement by the defendant to sell it. Neither the plaintiff nor P. had any connection with these negotiations. The subscriptions were not sufficient to pay the price agreed upon, and it was necessary to borrow a large sum of money upon a mortgage of the estate. The lender required that the mortgage note should be signed by some known responsible person, and thereupon the committee induced P. to take the conveyance to himself and to sign the mortgage and note. *Held*, that P. was not a purchaser of the estate, even if the information furnished him by the plaintiff induced him to take the position he did in regard to the property, within the meaning of a usage that a broker, whose services are accepted by the seller, and who introduces the seller to a purchaser, is entitled to a commission upon the amount for which the estate is sold, if ultimately purchased by the person so introduced, whether the sale is finally effected by the same broker or by another person. *Viaux v. Old South Society*, 1.

BURDEN OF PROOF.

See INTOXICATING LIQUORS, 5; SUPERIOR COURT, 1.

BY-LAW.

See CITY, 1; CORPORATION, 8.

CARRIER.

See BILL OF LADING, 2, 3; DAMAGES, 1, 5; TROVER, 1, 2.

CERTIORARI.

See BETTERMENT.

CHILD.

See BASTARD.

CITY.

1. Under a statute, authorizing a city to annex a penalty not exceeding fifty dollars for a breach of its by-laws, its board of fire commissioners (whose only authority is to make regulations subject to penalties provided for the breach of the city by-laws) has no power, after finding a person in the employ of the fire department guilty, on charges of violations of its rules and regulations, to sentence him to "forfeit the amount of one month's pay," which is one hundred dollars, a rule of the department providing that violations of its rules and regulations may be punished by fine; and he may maintain an action against the city for the amount so declared to be forfeited, and such action is not a violation by him of an agreement that he would be subject to the penalties in the regulations of the fire department. *Tyng v. Boston*, 372.
2. Under the St. of 1877, c. 133, which provides that in each of the cities of the Commonwealth, except Boston, the mayor and aldermen shall appoint two persons, "who together with the city physician shall constitute the board of health of such city," and under the St. of 1878, c. 21, which provides that, "in the cities of the Commonwealth where the city physician is *ex officio* a member of the board of health, said city physician shall be appointed by the mayor, with the approval of the board of aldermen, for a term of three years," the office of city physician is established in a city whose charter and ordinances make no provision in terms for such an office. *Commonwealth v. Swasey*, 538.
3. If a statute fixes the term of office of an officer of a city, who is to be appointed by the mayor with the approval of the board of aldermen, it is unnecessary that the term of his office should be expressed either in the nomination of the mayor or in the approval by the board of aldermen. *Ib.*

See ASSIGNMENT, 3; EMINENT DOMAIN; MASTER AND SERVANT, 1;
SCHOOL; SEWER; WAY, 2-4.

COLLATERAL SECURITY.

See EQUITY, 11; PLEDGE; SAVINGS BANK, 1.

COLLECTOR OF TAXES.

See ESTOPPEL; TAX.

COMMISSION.

See BROKER.

COMPLAINT.

1. A complaint to a trial justice by "A. W. T." alleged that the defendant, "on the twenty-fifth day of May," committed a certain offence; was dated "this twenty-fifth day of June;" and was signed by "A. W. K., complainant." The jurat was dated "this twenty-fifth day of May." The warrant issued by the trial justice directed the officer to arrest the defendant, to answer "on the foregoing complaint of A. W. K., this day made on oath before me;" and was dated "this twenty-fifth day of May." The return of the officer stated that he arrested the defendant "on June 1st." The record further showed that a hearing was had on the complaint before the magistrate on June 3, and the defendant was adjudged guilty and sentenced. *Held*, that the errors in the complaint were merely clerical ones, which could not mislead or prejudice the defendant, and furnished no ground for an arrest of judgment. *Commonwealth v. McMahon*, 394.
2. A complaint, alleging that the defendant, at a time and place named, being then and there duly licensed according to law to sell intoxicating liquors in a certain building, "did then and there wilfully and unlawfully place and maintain, and authorize to be placed and maintained, upon said premises used by him for the sale of intoxicating liquors under the provisions of his license as aforesaid, certain screens, blinds, shutters, partitions and other obstructions, which interfered with a view of the business conducted upon said premises," sets out an offence under the Pub. Sts. c. 100, § 12. *Commonwealth v. Auberton*, 404.

See DISORDERLY HOUSE; DRUNKENNESS; INTOXICATING LIQUORS, 1-9, 11;
VARIANCE, 3.

CONDITION.

See DEED, 3; EXCEPTIONS, 11; MORTGAGE, 3.

CONFESSION.

At the trial of a criminal case, an accomplice, who was a witness for the government, testified to the guilt of himself and of the defendant; and, on cross-examination, also testified that he made a confession of his guilt to the officer who arrested him; that such confession was induced by promises, on

the part of the officer, of protection and favor; and that the confession was true. *Held*, that the government might show, by the testimony of the officer, that the confession was voluntary. *Commonwealth v. Ackert*, 402.

CONSIDERATION.

See CONTRACT, II.

CONSIGNOR AND CONSIGNEE.

See BILL OF LADING; USAGE.

CONSTITUTIONAL LAW.

1. The St. of 1851, c. 290, reenacted in the Gen. Sts. c. 43, §§ 17, 18, and providing for the apportionment of damages awarded for the taking for a highway of land in which there are distinct or separate interests, is not unconstitutional so far as it affects the parties to a lease made after its passage; such parties must be deemed to have taken their title subject to these provisions; and if gross damages have been paid to a trustee appointed by the judge of probate, under said statutes, the lessee, or those claiming under him, cannot maintain a bill in equity against such trustee and the general owner of the land, to compel a different distribution of the damages from that provided for in the statutes, even if the appointment of the trustee was irregular or invalid. *Turner v. Robbins*, 207.
2. The Gen. Sts. c. 88, § 69, as amended by the St. of 1880, c. 94, providing that a license, granted to a person to keep a table for playing at pool for hire, "may be revoked at the pleasure of the authority granting it," is constitutional. *Commonwealth v. Kinsley*, 578.
3. The St. of 1876, c. 75, authorizing the owners of meadow lands lying on each side of the Neponset River to form a corporation for the purpose of draining and improving the meadows, and providing that the act shall take effect on its acceptance by a less number than all the owners, is unconstitutional, so far as it authorizes the corporation to maintain complaints under the mill act, Gen. Sts. c. 149, for flowing the meadows of owners who have not assented to the act. *Neponset Meadow Co. v. Tileston*, 189.
4. The St. of 1880, c. 227, imposing upon every corporation and association engaged within the Commonwealth in the business of life insurance an annual excise tax, "to be determined by assessment of the same upon a valuation equal to the aggregate net value of all policies in force on the thirty-first day of December then next preceding, issued or assumed by such corporation or association, and held by residents of the Commonwealth, at the rate of one half of one per centum per annum," is constitutional. *Connecticut Ins. Co. v. Commonwealth*, 161.

CONTRACT.

I. Making.

1. A written contract, which by its terms has expired, cannot be considered as existing afterwards from the fact that it has been so treated by the

party against whom it is sought to be enforced, or from the fact that he has made oral statements that he was bound by it. *Hopedale Machine Co. v. Entwistle*, 448.

2. Three persons holding land as trustees of an association composed of themselves and several other persons, called "the B. Company," entered into two contracts with the plaintiff, which, by the articles of the trust, they were authorized to make on behalf of the shareholders. Both of these contracts stated on their face that they were made by the trustees "as trustees of the B. Company;" and were both signed by these persons "as trustees" of the same company. By the first contract, the plaintiff was to construct a wharf "for said company on their land," on the line of a dock or canal "to be excavated for said company;" and "payments shall be made" at stated times. The second contract recited that the plaintiff agreed to construct a canal or dock "for said company on the company's land;" and the provision as to payments was substantially like that in the first contract. *Held*, that it was intended by these contracts to bind the company, and not the trustees personally, and that they were sufficient in form for that purpose; and that the addition of seals, being unnecessary, might be disregarded as surplusage. *Cook v. Gray*, 106.

See FRAUDS, STATUTE OF.

II. Consideration.

3. An agreement to forbear bringing suit for a debt due, for an indefinite time, if followed by actual forbearance for a reasonable time, is a good consideration for a promise to pay the debt by a person other than the debtor. *Howe v. Taggart*, 284.

See BOND, 2; VARIANCE, 2.

III. Validity.

4. A contract between two stockholders in a corporation, by the terms of which one, in consideration of a sum of money paid to him by the other, agrees to vote for a certain person as manager of the corporation, and also to vote to increase the salaries of the officers of the corporation, including that of the manager, is void as against public policy, unless it is assented to by all the stockholders of the corporation; and whether it is valid if so assented to, *quære*. *Woodruff v. Wentworth*, 309.

IV. Construction.

5. A written agreement provided that the defendant should work for the plaintiff for one year from a date named; that the plaintiff should pay the defendant for such labor a specified sum per month; that any inventions made by the defendant "while in his [the plaintiff's] employ" should be the plaintiff's property; and that the defendant should assign them accordingly. The defendant remained in the plaintiff's employ after the expiration of the year, and certain inventions were made by him afterwards. *Held*, on a bill in equity to enforce specific performance of this agreement, that the words "while in his employ" must be construed with reference

to the duration of the agreement; and that the defendant was not bound to assign to the plaintiff inventions made by him while employed by the plaintiff after the expiration of the year. *Hopedale Machine Co. v. Entwistle*, 443.

See EXCEPTIONS, 15.

V. *Performance and Breach.*

See ACTION, 3; DAMAGES, 2-5; EXCEPTIONS, 7; PLEADING, 8-5; WORK AND LABOR, 2-4.

VI. *Rescission.*

6. A. agreed to sell, and B. to purchase, A.'s milk route in certain towns, delivery to be made on a day named. In an action by A. against B. for breach of the agreement, in refusing to take the route and pay the consideration, A. testified, on cross-examination, that after he made the agreement, and before the day fixed for delivery, he bargained with C. to purchase his milk route, intending to run the same after B. took his route; that C.'s route comprised a portion of the same territory which he sold to B.; that he was not to disturb any of the customers of the route sold to B., but he considered he had a right to obtain new customers on the same route; that he told B. he had bargained for C.'s route, and also told him he could not hold the customers in one of the towns unless he got there early in the morning. *Held*, on this evidence, that the judge, before whom the case was tried, rightly directed a verdict for the defendant. *Munsey v. Butterfield*, 492.

See ACTION, 9; WORK AND LABOR, 1.

CONVERSION.

See ACTION, 6-8; DAMAGES, 1; TROVER.

COPYRIGHT.

See EQUITY, 1.

CORPORATION.

1. The St. of 1881, c. 113, providing that, when it appears from the pleadings in any suit that either party sues or is sued as a corporation, such fact shall be taken as admitted, unless the party controverting it shall file in court, within ten days from the time allowed for answer, a special demand for proof of the fact, does not apply to an action in which the plaintiff sues as a corporation, and in which an answer denying each and every allegation in the writ and declaration has been filed, and more than ten days have elapsed, after the time allowed for answer, before the passage of the statute; but it is incumbent on the plaintiff to prove the existence and organization of the alleged corporation. *Goodwin Bedstead Co. v. Darling*, 358.
2. Under the St. of 1868, c. 182, authorizing the corporation therein named, for the purpose of better supplying fresh water and of saving and restraining

the water that might percolate from a certain great pond into another pond named, in land owned by the corporation, to take, hold or purchase any land near or adjoining said land, and to enlarge the last-named pond and to raise a dam on said land, and providing that the water of said pond should never be drawn down lower than a certain depth, except for the purpose of repairing the dam or clearing out the pond, the corporation has no right to sink wells on the land so taken, for the purpose of intercepting the underground currents as a source of water supply; and such acts are *ultra vires* and illegal. *Attorney General v. Jamaica Pond Aqueduct*, 361.

3. A., who owned stock in a national bank, transferred it to B. to hold in trust for him, and a new certificate was issued to B., in which the stock was declared to be transferable only on the books of the bank by him or his attorney, on the surrender of the certificate. The bank had no notice of the trust. B. indorsed upon his certificate an assignment to A. and delivered it to him. The stock continued to stand in the name of B. on the books of the bank, and he voted on it and received the dividends thereon, which he paid to A., and acted as shareholder. B. became insolvent, and an assignee in insolvency was appointed. The stock had been previously attached by a creditor of B., and an order was afterwards made, on the application of the assignee and the creditor, under the Gen. Sts. c. 118, § 45, that the lien created by the attachment should continue. A. afterwards offered to surrender the certificate to the bank, and demanded a transfer of the stock to himself. The by-laws of the bank provided that the stock should be assignable only on its books, and that a transfer-book should be kept in which all assignments and transfers of stock should be made. *Held*, on a bill in equity by A. against the bank to compel a transfer of the stock, that the stock did not pass to the assignee in insolvency of B.; that the attachment was dissolved; and that A. was entitled to the transfer. *Sibley v. Quinsigamond Bank*, 515.
4. In an action against a corporation for an assault and battery and false imprisonment by its agents and servants, the plaintiff's evidence showed that a certain machine bought by him of the defendant was replevied upon a writ, in favor of the defendant, brought by one S., an attorney, who, in its service, committed the torts sued for; and that the replevin bond was signed by the defendant by G. manager. The plaintiff also offered to show that, at the trial of the replevin writ, G. testified that he was the manager and agent of the defendant; and further offered to prove that, before that writ was sued out, G., as such manager and agent, employed an attorney to sue out the writ; that the writ was placed in the hands of a person for service; and that, upon the refusal of this person and the attorney to serve the writ by committing a breach of the peace, G. said "he would find some one to obtain the machine;" and then followed the employment of, and service by, S. *Held*, that this evidence should have been submitted to the jury upon the question of S.'s agency. *Frost v. Domestic Sewing Machine Co.* 563.

See CITY, 1; CONTRACT, 4; EQUITY, 11; EXCEPTIONS, 15; RAILROAD, 1, 7; SAVINGS BANK; VARIANCE, 2.

COSTS.

1. The plaintiff in a personal action, brought originally in the Superior Court, who recovers a verdict of \$21.16, of which \$20 is for the original debt and \$1.16 is for interest from the date of the writ, is entitled to costs, under the Pub. Sta. c. 198, §§ 1, 5. *Douglass v. Nichols*, 470.
2. A. brought an action of contract against B., who filed an answer containing a general denial, and also filed a declaration in set-off. Subsequently B. was defaulted, and judgment was rendered against him on his default for more than \$1000 and costs. He then brought a writ of review, and, upon the trial, A. recovered a verdict of one dollar. Held, that, under the Pub. Sta. c. 187, §§ 84, 85, B. was entitled to costs, even if the sum recovered by A. in the original action was reduced by set-off upon the trial on the review. *Williams v. Williams*, 587.

COUNTY COMMISSIONERS.

It is not necessary that the adjudication of county commissioners, upon the subject matter of a petition presented by a person whose land has been taken for a railroad location, should be annexed to or made a part of the warrant for a jury subsequently issued by the commissioners, if a copy of the original petition is incorporated with the warrant. *Childs v. New Haven & Northampton Co.* 253.

COURT.

See PROBATE COURT; REPLEVIN, 1; SUPERIOR COURT.

COVENANT.

See ASSIGNMENT, 2; DEED, 3; EVIDENCE, 1.

CUSTOM.

See BROKER; USAGE.

DAM.

See CONSTITUTIONAL LAW, 3.

DAMAGES.

1. In an action against a common carrier for the conversion of goods delivered to a person unauthorized to receive them, who pays the freight upon them, the measure of damages is the market value of the goods, less the freight, with interest from the date of the conversion. *Forbes v. Boston & Lowell Railroad*, 154.
2. If the breach of a contract by one person to support another for his life is such that the latter may treat the contract as absolutely broken, and he so elects to treat it, he may recover damages for the whole value of the contract. *Parker v. Russell*, 74.

3. A declaration alleging that, in consideration of the conveyance by the plaintiff to the defendant of certain real estate, the defendant agreed to support the plaintiff during his life, and that the defendant accepted the conveyance and occupied the estate, but refused and neglected to perform his agreement, is sufficient to enable the plaintiff to recover damages as for a total breach of the agreement. *Parker v. Russell*, 74.
4. In an action for breach of an agreement by the defendant to support the plaintiff during his life, it appeared that the defendant supported the plaintiff in the former's house for five years, when the house was destroyed by fire; and that from the date of the fire to the date of the writ, a period of about two years, the defendant furnished no aid or support to the plaintiff. The judge instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole." *Held*, that the defendant had no ground of exception. *Ib.*
5. At the trial of an action of contract for a breach of the agreement of a railroad corporation to carry the plaintiff as a passenger on its railroad from S. to N., it appeared that he bought a ticket at S. which entitled him to be carried to N.; that the defendant's conductor refused to receive the ticket, and, when the train arrived at an intermediate station, the conductor, who was a railroad police officer, arrested the plaintiff for evading his fare, and delivered him into the custody of two police officers, who detained him during the night in the place provided for arrested persons. *Held*, that the detention of the plaintiff during the night, his discomforts in the place of detention, illness produced by the dampness of the cell in which he was confined, and the indignities which he suffered at the hands of the police officers, were not elements of damage, which he could recover in this action. *Murdock v. Boston & Albany Railroad*, 15.

See ACTION, 3, 6, 9; BANK; CONSTITUTIONAL LAW, 1; EMINENT DOMAIN; EXCEPTIONS, 7; FISHERY; INTOXICATING LIQUORS, 13, 14; LIBEL, 7; MALICIOUS PROSECUTION, 2; SEWER, 1; SHERIFF.

DEATH.

See ACTION, 2, 9; PLEADING, 2.

DECEIT.

A declaration alleged that the defendant was the cashier of a bank at which E. did business; that at a certain date, and for a long time before, E. was indebted to various persons in large sums of money, and was insolvent; that the bank had for a long time and continuously discounted commercial paper for E.; that E. had not, for a long time prior to said date, "been able to meet his current obligations when due by payment, and had procured extensions by new discounts of his paper from time to time;" that E. during the same time was buying goods and selling them for less than their value, making drafts for their price, and procuring them to be

discounted by the bank, through the hands of the defendant; that the defendant knew "the above-recited unusual, risky and deceptive manner in which E. was transacting his business, that he was of doubtful standing and responsibility, and was likely to fail, and was insolvent;" that, a short time before said date, E., who had never traded with the plaintiff before, applied to him for a sale of goods, and referred him, as to his standing and credit, to said bank; that at said date the plaintiff wrote to the defendant, as cashier of said bank, "as to the responsibility and financial standing of E.;" that the defendant replied by letter as follows: "Not familiar with detail of his business; he has paid all paper with his name upon maturity without protest promptly since my acquaintance with him," for a period of fifteen years; that the defendant, in making such representation, "did not deal fairly with the plaintiff and give him honestly such information as he had relative to the subject matter of the inquiry, but intended to and did deceive the plaintiff;" and that the plaintiff, relying on and deceived by the representations made by the defendant, sold and delivered goods to E., who at that time was insolvent and who failed in business, stopped payment, took the benefit of the insolvent law, and refused and neglected to pay the plaintiff for said goods. *Held*, on demurrer, that the declaration did not state a legal cause of action. *Potts v. Chapin*, 276.

DECLARATION.

See PLEADING, II.

DEED.

1. The rule that a deed of a disseisee conveys no title which can be enforced in the name of the grantee, against the disseisor or his privies, has no application to a conveyance of an incorporeal hereditament such as a right of way. *Randall v. Chase*, 210.
 2. If a second mortgagee of property, who is also a co-assignee in bankruptcy of the estate of the mortgagor, makes a quitclaim deed of the property to a third person, this constitutes the latter an assignee of the second mortgage, and does not pass the interest of the grantor as co-assignee in bankruptcy; and the equity of redemption remains in the assignees in bankruptcy. *Southwick v. Atlantic Ins. Co.* 457.
 8. A conveyance of a lot of land was subject to the "conditions" that "no dwelling-house or other building except necessary out-buildings shall be erected or placed on the rear of the said lot," and that "no buildings which may be erected on the said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for the term of twenty years" from a certain day. *Held*, that these were to be construed as restrictions, and not as conditions, and constituted a breach of a covenant against incumbrances in a subsequent deed. *Ayling v. Kramer*, 12.
- See EVIDENCE, 1, 8-5; EXCEPTIONS, 11; MORTGAGE, 1; PROMISSORY NOTE, 5; TRUST AND TRUSTEE, 10, 11.

DELIVERY.

See ACTION, 4; TROVER, 1, 2; USAGE.

DEMAND.

See ACTION, 6, 7; PROMISORY NOTE, 4; REPLEVIN, 8.

DEMURRER.

See APPEAL, 1; EXCEPTIONS, 9.

DEPOSITION.

In an action pending in Suffolk county in this Commonwealth, a commission was issued to take a deposition in a foreign country. The certificate of the magistrate annexed to the deposition was headed "State of Massachusetts, Suffolk ss." *Held*, on the issue whether the deposition was taken in the foreign country or in Suffolk county, that it was competent for the judge before whom the case was tried to find that it was taken in the foreign country from evidence that the envelope in which the deposition was received bore the postmark and postage-stamp of such foreign country. *McKinney v. Wilson*, 181.

See EXCEPTIONS, 6; SUPERIOR COURT, 1.

DEVISE AND LEGACY.

See EQUITY, 6; TRUST AND TRUSTEE, 6, 7.

DISORDERLY HOUSE.

A complaint for keeping a disorderly house may be maintained by proof that only one person in the neighborhood or community was disturbed or annoyed, if the acts done were of such a nature as tended to annoy all good citizens. *Commonwealth v. Hopkins*, 881.

See HUSBAND AND WIFE, 8.

DISSEISIN.

See DEED, 1.

DISTRICT COURT.

See REPLEVIN, 1.

DOG.

1. By the St. of 1867, c. 130, all dogs are required to be licensed and to wear a collar; and a penalty is imposed on any person keeping a dog contrary to the provisions of the act. By § 7, mayors of cities and the chairman of

selectmen of towns are required annually, within ten days from July 1, to issue a warrant to one or more police officers or constables, directing them to forthwith kill or cause to be killed all dogs not licensed and collared according to the provisions of this act, and to enter complaint against the owners or keepers thereof; "and any person may, and every police officer or constable shall, kill or cause to be killed all such dogs, whenever or wherever found." *Held*, that the last clause authorizes any person to kill a dog which is licensed, but has no collar on, provided he can do so without committing a trespass, although such killing is before July 1, and no warrant for the killing has been issued. *Morewood v. Wakefield*, 240.

2. In an action for an injury done by a dog to a child four years and eleven months old, in which facts tending to show a shock to his nervous system have been testified to, evidence is admissible that, ever since his injury, he has shown signs of fright and excitement at the sight of any dog. *Roswell v. Leslie*, 589.

DOMICIL.

See PAUPER, 2.

DOWER.

See INSOLVENT DEBTOR, 5; PROBATE COURT.

DRAIN.

See AMENDMENT, 2; SEWER.

DRUNKENNESS.

1. It is no defence to a complaint for drunkenness, under the Pub. Sts. c. 207, §§ 26, 27, which alleges two previous convictions of a like offence within the next preceding twelve months, that the first conviction relied upon by the government was also previously relied upon to aggravate the second offence. *Commonwealth v. Hughes*, 496.
2. At the trial of a complaint, under the Pub. Sts. c. 207, §§ 26, 27, for drunkenness by the voluntary use of intoxicating liquor, and alleging two previous convictions of a like offence within the next preceding twelve months, evidence that "the defendant was found in the streets behaving in a drunken manner, staggering, and with a large crowd around him, and that his breath smelled of liquor," together with evidence that he had been twice within a year convicted of drunkenness by the voluntary use of intoxicating liquor upon his pleas of guilty, may rightly be submitted to the jury to determine whether the drunkenness of the defendant was caused by the voluntary use of intoxicating liquor. *Id.*

EASEMENT.

- A. conveyed to B., his heirs and assigns, "a privilege of passing and repassing with carriages or otherwise, as the said B. may elect, in the driveway

by the westerly end and southerly side" of a certain block of buildings, "to land of B., said driveway to be kept not less than twelve feet wide." *Held*, that the right of way was definitely located twelve feet in width adjoining the buildings, and was not merely personal to B., but was an easement which B. could convey. *Randall v. Chase*, 210.

See DEED, 1; EVIDENCE, 8-6.

EASTERN RAILROAD.

See RAILROAD, 7.

EMINENT DOMAIN.

1. A licensee, under a parol license from the owner of land, of a well and an hydraulic ram thereon, cannot maintain a petition for damages against a city for an interference with the use of the well and ram, by the taking of the land by the city under the right of eminent domain. *Clapp v. Boston*, 367.
2. The St. of 1868, c. 163, gave a city the right to construct a reservoir and dam for the storage of water, and provided that the owner of any land taken by the city for the purposes of the act, or other person, who should sustain damage by the construction of any dam or reservoir, might apply by petition, for the assessment of his damages at any time within three years from the taking of said land or sustaining damage as aforesaid, and not afterwards; and that whenever any damages were sustained as above set forth, the city might, in case of neglect by the person damaged to institute proceedings for twelve months, commence such proceedings, which should be determined as if commenced by such person. *Held*, that a petition could not be maintained, after the expiration of three years from the construction of the dam and reservoir, by a person whose land was injured by water percolating through his land from the reservoir, although such percolation did not take place until after the expiration of the three years. *Davis v. New Bedford*, 549.

See ACTION, 1; FISHERY; SHERIFF; VOTE; WATERWORKS.

EQUITY.

I. Jurisdiction and General Principles.

1. The representation of a dramatic work, which the proprietor has never caused to be printed and has not obtained a copyright of, if made without license of the proprietor, is a violation of his right, and may be restrained by injunction, although such representation is from a copy obtained by a spectator attending a public representation by the proprietor for money, and afterwards writing it from memory. *Tompkins v. Halleck*, 32.
2. The ringing, at an early hour in the morning, (for the purpose of arousing the keepers of boarding-houses where operatives in a mill live, or for the purpose of arousing the operatives themselves,) of a bell weighing two

thousand pounds and set in an open tower forty feet from the ground, and so situated with respect to the residences of persons, owned and occupied by them before the erection of the bell, that they receive the full force of the sound, such persons being thereby deprived of sleep during hours usually devoted to repose, and personally annoyed and disturbed, and the quiet and comfort of their homes impaired, is a private nuisance to them; the owner of the mill may be restrained by injunction from ringing the bell for such purposes, the ringing not being shown to be necessary or reasonable; and evidence of a custom to ring the bells in other places for similar purposes is inadmissible. *Davis v. Sawyer*, 289.

3. A bill in equity against an aqueduct corporation, which was authorized by the St. of 1868, c. 182, to take land, to enlarge a pond on its land and to raise a dam on the land so taken, for the purpose of saving the water running to waste from the pond for aqueduct purposes, alleged that the corporation was sinking a deep well on land of which the plaintiff was the owner in fee, and which the defendant took under the statute, and was erecting thereon powerful hydraulic pumping machinery, to be used in pumping water from the well for the purpose of supplying water to its customers; that the plaintiff was the owner of other land adjoining that so taken, and also of valuable water-rights and privileges immediately below the land taken; and that such adjoining land and water-rights and privileges would be seriously impaired in value by the acts of the corporation, in tapping and drawing off the underground sources of supply of such water-rights and privileges. *Held*, on demurrer, that the bill stated a case within the equity jurisdiction of the court. *Hart v. Jamaica Pond Aqueduct*, 488.
4. An owner of land on a natural stream may maintain a bill in equity to restrain another owner of land on the stream from carrying on business on his land in such a way as to pollute the waters of the stream to the material injury of the plaintiff; and such right is not taken away by the St. of 1878, c. 183, which confers certain powers over streams upon the State Board of Health. *Harris v. Mackintosh*, 228.
5. A town, authorized by statute to take water from a river, acquired land on the bank of the river, and took the water by percolation into a filtering gallery. Four thousand feet above its works, A. carried on the business of wool-pulling, and cast daily into the stream, in the process of such business, animal matter in a state of decomposition, together with a small amount of arsenic. The quantity so cast into the river made no perceptible difference in the quality of the water at the point where the town took its supply, and no trace of arsenic could be there discovered by chemical analysis. If the town should take its water directly from the river, there would be a possibility, especially in times of freshets, that some arsenic would be carried into the water used by the town. A.'s factory was not run to its full extent, and the danger from arsenic would be increased by any increase in the use of the factory. A. could not acquire a prescriptive right to pollute the river. *Held*, that the town could not maintain a bill in equity against A. to restrain him by injunction from continuing his business. *Brookline v. Mackintosh*, 215.

6. An executor of a will, by which the testator gives to his daughter H certain real and personal property absolutely, and the rest and residue of his property for the support of his daughter C., cannot maintain a bill in equity to obtain the instructions of the court, if the only conflict between the persons interested in the estate, and the only question presented by the bill, is whether, at the death of C., the property is to belong to H., or is to be divided among the heirs at law of the testator. *Wilbur v. Mazam*, 541.
7. An administrator cannot maintain a bill in equity to obtain the instructions of this court as to the distribution of the proceeds of real estate, sold by him under a license from the Probate Court, until the surplus remaining on the final settlement of his accounts in that court has been ascertained. *Muldoon v. Muldoon*, 111.
8. If two executors have united in misusing funds in their hands, in the purchase of land for their own benefit, and profits have arisen from such purchase, which are held by one of them, or the title to the land stands in the name of one of them, and it does not appear that the persons interested in the estate are debarred by acquiescence or otherwise from their right to avail themselves of the advantage of the purchase, the other executor cannot maintain a bill in equity for an account and for the payment to him of a proportionate share of the profits. *Bowen v. Richardson*, 293.
9. The condition of a mortgage of land contained the provisions, that the mortgagor should pay to the mortgagee a certain sum in five years, with interest at a certain rate, payable semiannually; that the mortgagor should also pay all taxes and assessments upon or on account of the mortgaged premises; that the mortgagor might at his option pay the whole or any part of the mortgage debt at any time within the five years; and that the mortgagee would at any time release to the mortgagor any portion of the premises upon payment of a certain sum per foot for the portion so released, which amount should be indorsed upon the mortgage note. After default, not only as to the payment of the interest and taxes, but also of the principal, a person, who bought the land subject to the mortgage, brought a bill in equity against the mortgagee to compel the release of a portion of the mortgaged premises. No demand for such release, nor tender of the stipulated price per foot for the same, was made until more than two years after the expiration of the time for the payment of the principal; and the mortgagee had not by any act waived or deprived himself of any rights under the mortgage. Held, that the bill could not be maintained. *Reed v. Jones*, 116.
10. A testator named R. executor of his will, and R. and D. trustees thereof, and gave full power to them or the survivors of them to deal with the trust estate. He also gave to the trustees specific sums to hold on separate trusts for the benefit of three persons named, and also created a residuary trust fund. R. was duly appointed executor, and subsequently sole trustee. D. was never appointed trustee, and filed in the Probate Court a resignation of his trust. On the same day that R. was appointed sole trustee, his first account, filed some time before, was allowed by the Probate Court, at

the request of persons other than the three beneficiaries, and without further notice, in which he credited himself as executor with moneys paid to the trustees of the beneficiaries equal in amount to the sums named in the will. At that time R. had funds in his hands sufficient for this purpose. On the same day, three other accounts, signed by R. and D. as trustees, and containing items of income paid over to the three *cestuis que trust* at different times, were allowed by the Probate Court with the assent of the *cestuis que trust*. A second and final account of R. as executor was subsequently allowed by the Probate Court, showing his disbursements of all the assets in his hands as executor when the first account was rendered, in which he credited himself with a certain sum paid to himself as trustee of the residuary trust fund. He also filed an account as trustee of the residuary trust fund; and was subsequently removed by the Probate Court from the offices of executor and trustee. *Held*, on a bill in equity, by his successor in the trusts, to determine whether, as between the specific and the residuary *cestuis que trust*, R. as executor had paid to himself as trustee the moneys specifically left in trust, that the accounts filed by him warranted a finding that he had so paid them. *Crocker v. Dillon*, 91.

11. A number of persons associated themselves together to purchase of a corporation a large parcel of flats. As part of the consideration, the flats were to be filled by the corporation within seven months. The conveyance was made to trustees of the associates; and the interests of the latter were divided into shares, and the trustees issued to each associate a certificate of the number of shares belonging to him. Each associate paid to the corporation in money ten per cent of his proportion of the entire consideration, and executed to the corporation his personal bond for the payment of the remaining ninety per cent of his proportion, payable one half in two years and one half in three years, with interest semiannually, and transferred to the corporation his certificate of shares, as collateral security for the payment of the bond. The bond also contained a clause, by which it was agreed that the whole or any part of it might be paid, when interest was payable, and that when paid either by advance payments, or by the regular payment of instalments, the shares pledged should be released. By the terms of the transfer, the corporation was authorized to receive any dividends which might be made by the trustees, and, on payment of the bond "by said dividends or otherwise," the certificate was to be reassigned to the owner. Each certificate contained this clause: "Said share is transferable by assignment in writing on this certificate, recorded on the books of the trustees, and not otherwise, except when the share is pledged; in which case the interest of the general owner therein may be assigned in writing, approved by the trustees, and recorded in the books." By the terms of a declaration of trust, the trustees were to manage and dispose of the property from time to time, and to divide the net proceeds of sales among the general owners of the shares at the time of declaring dividends, or as such owners might order in any assignment of their shares as collateral security; and that, unless expressly provided in the instrument creating the pledge, the pledgor should alone be entitled to vote or to

receive dividends. *Held*, on a bill in equity, that the corporation, taking one of these certificates as collateral security for the payment of a bond, was not obliged to hold it until paid by dividends arising from the proceeds of the sale of the land, but was entitled, upon default in payment of the bond, to foreclose the pledge by a sale of the certificate. *Merchants' Bank v. Thompson*, 482.

See ASSIGNMENT, 1, 2; CONSTITUTIONAL LAW, 1; CONTRACT, 5; CORPORATION, 3; INFORMATION, 1; INSOLVENT DEBTOR, 4, 5; INTEREST; RAILROAD, 7; TRUST AND TRUSTEE, 2-6, 9.

II. Pleading and Practice.

12. Objections to a bill in equity that the plaintiff has an adequate remedy at law, and that the bill is multifarious, are waived by answering and submitting to the jurisdiction of the court, and going to hearing on the merits. *Crocker v. Dillon*, 91.
13. An order in equity refusing a motion for issues to the jury, and which is excepted to, is subject to revision on a report of the case. *Harris v. Mackintosh*, 228.
14. On a bill in equity by a riparian proprietor of land on a natural stream to restrain another proprietor from so conducting his business as to pollute the waters of the stream, and to cause disagreeable odors at the plaintiff's land, the answer denied that the stream was polluted or disagreeable odors produced at the plaintiff's land, or that the plaintiff intended to use his land as a residence, and alleged that the defendant had a prescriptive right to carry on his business in the manner he was carrying it on. The defendant filed a motion for issues to a jury. This motion was overruled by the judge before whom the case was heard. *Held*, on a report of the case, that the motion should have been granted. *Ib.*

ESCAPE.

A person who has been arrested on mesne process, admitted to bail, and afterwards surrendered by his bail to the keeper of a jail, is "lawfully imprisoned," within the Gen. Sts. c. 178, § 46; and, if he forcibly escapes from the jail, he may be convicted, under said statute. *Commonwealth v. Barker*, 399.

ESTATES OF DECEASED PERSONS.

See AMENDMENT, 1; BOND, 1; EQUITY, 6-8, 10; PLEADING, 2; PROBATE COURT; TRUST AND TRUSTEE, 7, 8.

ESTOPPEL.

If a waiver, by all persons interested in land sold by a collector of taxes, of an informality in the sale, after the bringing of a writ of entry by the purchaser at the sale against a person claiming title to the land as a disseisor, will operate by estoppel to make good the demandant's title as against

such persons, it will not have that effect as against the tenant. *Reed v. Crapo*, 201.

See PAUPER, 1.

EVICITION.

See ASSAULT, 2.

EVIDENCE.

1. In an action for a breach of the covenant against incumbrances in a deed of land, evidence of the original agreement of the owner to convey the land to a person who assigned the agreement to the grantor of the defendant, the deed to such grantor having been given in pursuance of the agreement, is inadmissible. *Ayling v. Kramer*, 12.
2. In an action for breach of a contract to pay for a cargo of ice, the plaintiff contended that the contract was to deliver the cargo at a certain wharf, if a certain depth of water could be found there. *Held*, that he might introduce the testimony of a pilot, who endeavored, under the plaintiff's orders, to tow the vessel containing the ice to the wharf, that such depth of water was not to be found there. *Phillips v. Cornell*, 546.
3. A. conveyed to B. a right of way, describing it as a driveway by the westerly end and southerly side of a block of buildings to land of B. The land of B. was afterwards conveyed to C., by a deed describing the way as on the westerly end and southerly side of said tract of land. In an action by C. against a grantee of A.'s land for obstructing the way, in which the precise location of the way was in dispute, it was *held*, that C. was entitled to put in evidence the deed from A. to B. *Randall v. Chase*, 210.
4. In an action of tort for obstructing a right of way, the location of the way was in dispute, the plaintiff contending that it adjoined a certain block of buildings. The plaintiff put in evidence a deed, describing the way according to the plaintiff's contention. This deed was made more than thirty years before, and the person who then owned the plaintiff's estate was a party to it. He also subsequently owned the defendant's estate. *Held*, that the defendant had no ground of exception to its admission. *Ib.*
5. In an action of tort for obstructing a driveway which the plaintiff claimed over the defendant's land, the location of the way was in dispute. The defendant's deed described one of his boundary lines as running from the county road about thirty-eight feet to the centre of a driveway. *Held*, that the establishment of the line of the county road had some tendency to show where the driveway was; and that, for this purpose, it was competent to show the line of occupation of the county road by fences or projections of buildings. *Held, also*, that a photograph of these structures was admissible in evidence to assist the jury in understanding the case, if verified by proof that it was a true representation. *Ib.*
6. Where the defendant, in an action against him for obstructing a right of way, contends that he has acquired such right by adverse possession,

- evidence is inadmissible that the way has been similarly obstructed by other persons in places over which the plaintiff did not have occasion to pass in reaching the highway. *Randall v. Chase*, 210.
7. If a witness, on looking at an entry in a book made by him at the time, is able from it to testify to the delivery of articles, his testimony is admissible, although he has no present memory of the transaction; and if he cannot, from recollection, fix the date, that being a material fact, the entry itself is admissible for that purpose. *Costello v. Crowell*, 352.
 8. At the trial of an action by the executor of the payee of a promissory note against the alleged maker, the defence to which was that the signature of the maker was a forgery, a master in chancery was allowed to testify, against the plaintiff's objection, to declarations made by the plaintiff's testator as to his property and means when offering himself as bail for his son in a criminal case. This son had indorsed to his father another note purporting to be signed by the same person as the note in suit. The evidence was admitted for the sole purpose of showing the circumstances under which the declarations were made, and the authority of the magistrate. *Held*, that the plaintiff did not show any ground of exception. *Ib.*
 9. A party cannot put in evidence a letter containing declarations of a stranger to the action, not under oath, and not shown to be connected with the adverse party in any such way as to make his statements admissible. *Lyon v. Manning*, 439.
 10. In an action for interfering with the plaintiff's right to cut timber, which right he was exercising in good faith and under claim of title under a deed, the defendant may show that the plaintiff's grantor had, previously to the deed to the plaintiff, conveyed all his right in said land, although the defendant does not claim under the last-named deed. *Putnam v. Lewis*, 264.
 11. At the trial of an action upon a promissory note made by the defendant's intestate, the issue was whether the signature of the intestate was genuine or forged. The payee of the note testified that the intestate was financially embarrassed, and applied by letter to the witness for a loan of the money for which the note was given; which letter was in evidence. The defendant offered the evidence of the cashiers of two banks, that the intestate could have borrowed money at each bank; which evidence was excluded. *Held*, that the defendant showed no ground of exception. *Costello v. Crowell*, 352.
 12. On the issue whether the signature of the maker to a promissory note was genuine or forged, in an action on the note, the plaintiff put in evidence two letters, with proof, not by experts, that they were in the handwriting of the maker. The defendant called experts, who testified that, in their opinion, the letters were not in the maker's handwriting. The plaintiff was then allowed to call an expert to testify that, in his opinion, the letters were in the maker's handwriting. *Held*, that the admission of this testimony was within the discretion of the judge. *Ib.*
 13. Where the genuineness of a signature of a person is in issue, a paper containing another signature of such person may be admitted in evidence,

as a standard of comparison, if its genuineness is found as a fact by the presiding judge upon clear and undoubted testimony, before it is submitted to the jury; and that finding cannot be revised or set aside by this court, unless it is founded upon error in law or improper or insufficient evidence. *Costello v. Crowell*, 352.

14. In an action by a payee against the alleged maker of a promissory note, the defence to which was that the signature of the maker was a forgery, the defendant, for the purpose of showing that the payee did not have the means of advancing the money which he alleged was the consideration of the note, was allowed to show that the plaintiff did not use means which he did possess. *Held*, that if there was evidence that the plaintiff had no other means, the evidence admitted was competent; and that if there was no such evidence, the evidence was immaterial, and the plaintiff could not be prejudiced by it. *Ib.*

See ACTION, 4; AUDITOR; CONFESSION; CONTRACT, 1, 6; DEPOSITION; DOG, 2; DRUNKENNESS, 2; EQUITY, 2, 10; EXCEPTIONS, 1, 4, 5, 10, 12-14; FRAUDULENT CONVEYANCE, 2; INTOXICATING LIQUORS, 4, 5, 7, 9, 12; JUDGMENT; LIBEL, 1-4; PAUPER, 2; PLEADING, 7; PRINCIPAL AND AGENT; PROMISSORY NOTE, 3, 4; SEWER, 2; USE AND OCCUPATION, 2; VERDICT; WILL; WITNESS; WORK AND LABOR, 4.

EXCEPTIONS.

1. An objection that certain evidence was improperly rejected by an auditor, not raised at the trial in the Superior Court, is not open upon a bill of exceptions. *Eagan v. Luby*, 543.
2. No exception lies to the refusal to give an instruction in the language requested, if it is given in substance. *Randall v. Chase*, 210.
3. A refusal to give an instruction based upon a part of the evidence only, affords no ground of exception. *Murphy v. Boston & Albany Railroad*, 121.
4. If incompetent evidence, admitted under objection, is withdrawn by the judge with instructions to the jury to disregard it, the objecting party has no ground of exception. *Costello v. Crowell*, 352.
5. If no instructions are asked as to the use and effect of evidence admitted under objection at the trial, it is not open to the objecting party to contend in this court that the evidence was not limited by the judge in his instructions to the only purpose for which it was competent. *Potter v. Baldwin*, 427.
6. No exception lies to the refusal of a judge to allow the counsel of one party to ask him why he did not use the deposition of a person which had been taken for use at the trial, but not offered in evidence; nor to the argument of the adverse party that the excepting party did not use the deposition because he dared not, as it would corroborate the adverse party, no objection having been taken to the argument at the time, or instruction asked relating thereto. *Learned v. Hall*, 417.
7. If damages for delay in the performance of a contract in the nature of demurrage are allowed to the plaintiff by an auditor in a certain sum, and

a comparison of his report with a verdict rendered by a jury for the plaintiff shows that this sum formed no part of the verdict, no question thereon is open to the defendant upon the argument of exceptions in this court. *Phillips v. Cornell*, 548.

8. In an action upon a policy of life insurance, the declaration in which contains two counts, one for the amount of the insurance, and the other for money had and received, it is not open to the plaintiff to contend upon exceptions in this court that, under the second count, he can recover the amount of the premiums paid, on the ground that the policy never attached, if the question was not raised at the trial. *McCoy v. Metropolitan Ins. Co.* 82.
9. The defendant in an action, after he had filed an answer to the declaration, which contained two counts, on the plaintiff's filing a third count, filed, by leave of court and the consent of the plaintiff, an answer containing a demurrer to the whole declaration. The plaintiff gave his consent, supposing that it was an answer to the third count only; and it did not appear that the judge understood that it was an answer and a demurrer to all the three counts when he gave leave to file it. The judge ordered the demurrer to be confined to the third count. *Held*, that the defendant had no ground of exception. *Howe v. Taggart*, 284.
10. In an action under the Gen. Sts. c. 85, § 1, to recover treble the amount of money lost by gaming, the defendant was asked on cross-examination whether there had been any change in the occupancy of his premises in which the alleged loss occurred, and answered that there had not. *Held*, on a bill of exceptions which stated merely this question and answer, and not the connection in which the question was put, that the defendant showed no ground of exception to the admissibility of the question and answer. *Morris v. Farrington*, 466.
11. On a bill in equity involving the construction of a deed of land containing certain "conditions" so called, there was evidence from a plan annexed to the deed, and from other deeds of adjoining and neighboring estates, that the conditions were a part of a general plan of improvement, and they were construed as restrictions. In a subsequent action involving the construction of the same deed, at the argument on the defendant's exceptions, the defendant contended that the judge who tried the case erred in giving the same construction to the deed as this court had formerly given, on the ground that the deeds of the adjoining and neighboring estates were not put in evidence. *Held*, that, as he had not called the attention of the judge to this omission in the evidence, the point was not open to him. *Ayling v. Kramer*, 12.
12. At the trial of a petition before a sheriff's jury, for an assessment of damages sustained by the petitioner by the taking of a portion of his land for a railroad location, it appeared that there was upon the petitioner's remaining land chestnut timber suitable for ties. The respondent offered evidence that there would be a greater demand for chestnut ties in the vicinity by reason of the construction of the railroad; and also offered evidence "of a convenient place of delivery at a new depot of said railroad." There was evidence of a station of another railroad more accessible from the

petitioner's woodland by the distance of one third of a mile. The evidence offered was rejected. *Held*, that the respondent had no ground of exception. *Childs v. New Haven & Northampton Co.* 253.

13. At the trial of an indictment against A. and B. jointly, for an assault upon a police officer while in the discharge of his duty, another officer testified that, on the morning after the assault, he went to B.'s house, and B. related to him where he had been the night before, and stated that he was with A. and another man; that when they were on a certain street A. was making a noise; that an officer came up to them and asked them to stop their noise; that A. made an offensive remark to the officer, who was about to arrest him, whereupon B. asked the officer to make some allowance for A. as he was intoxicated, and said that he would take A. home; that the officer then let them pass on, and they walked down the street; that, when they had gone a short distance, A. turned and struck the officer; and that, when he saw this, B. left. The conversation testified to took place in the absence of A. The judge admitted it as affecting B.'s connection with the assault only, and so ruled; but gave no specific direction to the jury in relation to the evidence. *Held*, that the evidence was competent against B.; and that A., not having requested an instruction limiting its effect, had no ground of exception to the admission of the evidence. *Commonwealth v. Keating*, 572.
14. In an action for breach of a contract, the plaintiff offered evidence to show that the contract was to deliver a cargo of ice for unloading at a certain wharf, upon the condition that the depth of the water there was not less than a certain number of feet; and the defendant offered evidence to show that the contract was to deliver the cargo at the wharf, without any condition as to the depth of the water. The defendant asked the judge to instruct the jury, "that, if the plaintiff sold the cargo of ice to be delivered on the wharf in question to the defendant, it was the plaintiff's duty to land the cargo there before he could recover;" and that "if such was the fact, the making of a new contract, the burden is on the plaintiff; he must satisfy the jury of a new contract." These instructions were refused. *Held*, that the defendant had no ground of exception. *Phillips v. Cornell*, 546.
15. A declaration alleged that, in consideration that the plaintiff would do a certain act in relation to a corporation, of which the plaintiff and the defendant were both members, the defendant agreed to pay the plaintiff a sum named when certain bonuses were paid to the defendant by the corporation; that the plaintiff did the act, and the bonuses were paid to the defendant by the corporation; and that the defendant refused to pay the plaintiff the sum promised. The evidence introduced at the trial showed that the defendant assigned the bonuses to a person, to whom the corporation paid a portion of the amount due thereon; that the assignee sold the bonuses remaining for a sum less than the balance due; and that the purchaser was paid the full amount of such balance by the treasurer of the corporation, to whom, according to a previous agreement between them, the purchaser paid the difference between the total value of the bonuses and the whole amount paid to the assignee. The judge instructed the jury, that,

if they found that the corporation actually paid the whole amount of the bonuses to any assignee of the defendant, this was such a payment of the bonuses to the defendant that the action could be maintained; but that, if they found that the corporation had not paid the bonuses in full, but had succeeded by any means in purchasing them for a sum less than was due upon them, then that would not be such a payment of them as would sustain the action. *Held*, that the defendant had no ground of exception. *Woodruff v. Wentworth*, 309.

16. A refusal of the Superior Court to confirm and to render judgment upon the report of commissioners appointed to make partition, on the ground that it is invalid in law, is an interlocutory and not a final decision, and exceptions thereto are prematurely entered in this court. *Boyce v. Wheeler*, 554.

See DAMAGES, 4; EVIDENCE, 4, 8, 11-14; INTOXICATING LIQUORS, 4, 7, 11; LIBEL, 2, 3, 7; PAUPER, 2; PLEDGE, 1; POOR DEBTOR, 2, 4; SUPERIOR COURT, 2; WILL, 2; WORK AND LABOR, 4.

EXPERT.

See EVIDENCE, 12.

EXECUTION.

If land subject to a mortgage is levied on as having been conveyed by the judgment debtor in fraud of creditors, by a sale of it as an equity of redemption, it is no objection to the validity of the levy that the mortgage covered another parcel of land conveyed by the debtor to a different grantee. *Mansfield v. Dyer*, 374.

See MORTGAGE, 2; RETURN.

EXECUTOR AND ADMINISTRATOR.

See ACTION, 9; AMENDMENT, 1; BOND, 1; EQUITY, 6-8, 10; PLEADING, 2; PROBATE COURT; TRUST AND TRUSTEE, 1, 7.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION, 2.

FIRE DEPARTMENT.

See CITY, 1.

FISHERY.

The St. of 1879, c. 45, authorized a town to make the necessary improvements for the preservation and taking of alewives in a great pond and the waters connected therewith; enacted that the town should pay "all damages that shall be sustained in any way by any persons in their property, in carrying into effect this act;" and provided that any fishery so created should be the property of the town. *Held*, that a person whose land on both sides

of a non-navigable stream, connecting with the pond, was taken under this act, could recover compensation only for the land taken, and not for the value of the fishery to him as a riparian owner. *Cole v. Eastham*, 65.

FLOWING LAND.

See CONSTITUTIONAL LAW, 3.

FORGERY.

See EVIDENCE, 11-14; SAVINGS BANK, 1.

FRAUD.

See PROMISSORY NOTE, 3.

FRAUDS, STATUTE OF.

An agreement by a grantee, in consideration of the conveyance of land, to support the grantor during his life, is not a contract for the sale of land or any interest therein, within the statute of frauds. *Lyman v. Lyman*, 414.

FRAUDULENT CONVEYANCE.

1. If a wife pays, with money earned by her own labor, since the St. of 1874, c. 184, a promissory note made by her husband and the principal and interest of a mortgage on land owned by him, a conveyance of the land by him to her through a third person, made in connection with such payments, is not in fraud of his creditors. *Draper v. Buggee*, 258.
2. In an action of replevin, if the plaintiff claims title to the property replevied under a bill of sale given to him by a third person, which is contended by the defendant to be fraudulent as against the creditors of such person, the defendant is not entitled to introduce evidence that a mortgage, given by the third person to the plaintiff more than a year after the date of the bill of sale, is also fraudulent as to creditors, no connection being shown between the two transactions. *Edmunds v. Hill*, 445.

See EXECUTION; INSOLVENT DEBTOR, 4, 5; MORTGAGE, 2.

FRAUDULENT REPRESENTATION.

See DECEIT; PLEADING, 3.

GAMING.

If a loser of money by gaming does not bring an action therefor within three months, under the Gen. Sts. c. 85, § 1, it will not defeat an action brought by another person, that the loser is to receive some benefit from the action, under an agreement between him and the plaintiff made after the right of

action had accrued to the plaintiff, there being no covin or collusion between them by which suit was delayed by the loser. *Morris v. Farrington*, 466.

See EXCEPTIONS, 10; POOR DEBTOR, 3, 4; VENUE.

GOODS SOLD AND DELIVERED.

See PRINCIPAL AND AGENT, 2.

GUARDIAN AND WARD.

A guardian cannot, during the existence of that relation, maintain an action at law against his ward for necessities furnished to him, even if the guardian has no property of the ward in his possession. *McLane v. Curran*, 531.

See INSOLVENT DEBTOR, 4.

HUSBAND AND WIFE.

1. A husband is liable for legal services rendered to his wife in successfully defending her against a complaint instituted against her by him for being a common drunkard. *Conant v. Burnham*, 503.
2. A husband is not liable for legal services rendered his wife in instituting a complaint against him for an assault and battery upon her. *Ib.*
3. A married woman may be convicted of keeping a disorderly house, if she acts of her own free will and without any coercion by her husband. *Commonwealth v. Hopkins*, 381.
4. The fact that, at the time of an unlawful sale of intoxicating liquor by a married woman, her husband was lying sick upon a bed in a room adjoining that in which the sale took place, the door between the rooms being open, does not raise a conclusive presumption of law that she was acting under his coercion. *Commonwealth v. Gormley*, 580.

See APPEAL, 2; FRAUDULENT CONVEYANCE, 1; INSOLVENT DEBTOR, 5; INTOXICATING LIQUORS, 12-14.

INDICTMENT.

An indictment on the Pub. Sts. c. 202, § 19, alleging that the defendant, at a time and place named, "with force and arms, with malicious intent one A. then and there to maim and disfigure, in and upon the said A. feloniously did make an assault," and that he "a portion of the nose of the said A. then and there feloniously and maliciously did bite off," is a good indictment for assault and battery; and a motion to quash the indictment, on the ground that it does not properly set forth the offence described in the statute, and a motion that the defendant be allowed to plead specially to the charge of assault and battery, are rightly overruled. *Commonwealth v. Blaney*, 571.

See RAILROAD, 4; VARIANCE, 3; VERDICT; WAY, 1.

INFORMATION.

1. An information in equity, in the name of the attorney general, will lie against a quasi public corporation doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are not only to impair the rights of the public in the use of one of the great ponds of the Commonwealth for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud and offensive vegetation detrimental to the public health. *Attorney General v. Jamaica Pond Aqueduct*, 361.
2. Where a city physician is *ex officio* a member of the board of health, his title to his office may be tried by an information in the nature of a *quo warranto*. *Commonwealth v. Scasey*, 538.
3. If a person is wrongfully holding a public office, he may be ousted on an information in the nature of a *quo warranto*, although the term of the person who was entitled to the office when the information was filed expires before judgment is rendered. *Ib.*

INSOLVENT DEBTOR.

1. A creditor of an insolvent debtor, who has a mortgage of real estate of the debtor as security for his claim, and who joins with the assignee in insolvency in making sale of the property, without the order of the judge of insolvency, cannot be allowed, under the Gen. Sts. c. 118, § 27, to prove the residue of his claim, after applying the proceeds of the sale. *Smith v. Warner*, 71.
2. A creditor, who levies an execution, issued upon a judgment obtained by him against his debtor, on land of the debtor, which is set off to him, and seisin and possession thereof are received by him in full satisfaction of his judgment, is not entitled afterwards, if the debtor becomes insolvent, to tender a deed of release of the land to the assignee in insolvency, and be admitted as a creditor for the amount of the judgment, under the Gen. Sts. c. 118, § 27, although the land, at the time of the levy, stood in the name of a third person. *Wareham Savings Bank v. Vaughan*, 534.
3. Under the Gen. Sts. c. 118, § 45, providing that the judge, before whom proceedings in insolvency are pending, may order the lien created by an attachment of the property of an insolvent debtor to continue, upon application made by any person interested "on or before the day of the third meeting of creditors," taken in connection with the provision of § 75, that the third meeting of the creditors is "to be held within six months from the time of the appointment of the assignee," the application must be made on or before the day provided by law for the holding of the third meeting, and cannot be made at an adjournment of that meeting. *Nelson v. Winchester*, 435.
4. A guardian, who had misappropriated money belonging to his ward, being insolvent, within six months before the filing of a petition in insolvency against him, and with a view to give a preference to his ward, deposited his own money in a savings bank in his name as guardian of the

ward. *Held*, that his assignee in insolvency could maintain a bill in equity to recover the amount so deposited, although the ward was ignorant of the misappropriation and of the fact of the guardian's insolvency. *Bush v. Moore*, 198.

5. A wife's release of dower in her husband's land, at his request and for his benefit, in consideration of an agreement by him to make a transfer to her of shares of stock in a corporation, which are no more than a fair equivalent for the value of the dower, he being solvent at the time of making such agreement, vests in her such an equitable title to the shares agreed to be transferred, that his assignees in insolvency cannot, on a bill in equity, avoid a subsequent transfer of the shares to her, made by him when insolvent, under such circumstances that it would be in fraud of the Gen. Sts. c. 118, § 91, if the property then belonged to him. *Holmes v. Winchester*, 140.
6. The effect of a discharge in insolvency is to be determined by the law in force at the time it is granted, and not by the law in force at the time the proceedings in insolvency are begun. *Batten v. Sisson*, 557.

See CORPORATION, 3.

INSURANCE.

I. Life.

1. If an application for a policy of insurance on the life of a person provides that the representations and answers made therein "shall form the basis and become part of the contract of insurance," and "that any untrue answers will render the policy null and void," and the policy recites that it is issued "in consideration of the representations and agreements in the application for this policy, which application is referred to and made a part of this contract," in an action upon the policy the application is to be considered a part of the contract, and if the representations in it are in a material respect untrue, the action cannot be maintained, although the untrue representations were inserted in the application by the agent employed by the defendant to solicit insurance, without the knowledge of the applicant, who orally stated the truth to the agent; and the Sts. of 1861, c. 170, and 1864, c. 114, do not apply. *McCoy v. Metropolitan Ins. Co.* 82.

See CONSTITUTIONAL LAW, 4; EXCEPTIONS, 8.

II. Fire.

2. A description, in a policy of insurance, of the ownership of property as "his frame dwelling-house," by an assured whose only title thereto is under a quitclaim deed from a second mortgagee of the property, avoids the policy under a clause providing that, "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the benefit of the assured, the policy shall be void." *Southwick v. Atlantic Ins. Co.* 457.
3. Insurance against fire was effected on goods contained in the chambers of A. in brick, stone and iron building No. 117 Franklin Street. A. was the

proprietor of a printing establishment and occupied chambers in buildings owned by four different persons, all of which fronted on Federal Street. The entrance to the upper stories of one of them was at 117 Franklin Street, and the other three had entrances to their upper stories on Federal Street. The one having its entrance on Franklin Street and the two others adjoining were built at the same time, and were known as the Franklin Buildings. There were party-walls between them. The fourth building was put up soon after, with distinct walls and with floors at a different level, and was known as the M. Building. Doors were cut through the walls of all the buildings, so that A.'s chambers were connected with each other, and the public entrance to all of them was at 117 Franklin Street, though they were accessible by the staircases leading from Federal Street. At the time of a loss by fire, some of the goods destroyed were in one of the Franklin Buildings, the entrance to the staircase of which was on Federal Street; and other goods destroyed were in the M. Building. *Held*, that the former were covered by the insurance, and that the latter were not. *Sampson v. Security Ins. Co.* 49.

INTEREST.

A partner, who has had the management of the business of the firm, and has never made a settlement with or rendered a final account to his copartner, and whose duty it is to wind up the affairs of the partnership on its dissolution, is chargeable with interest, as between himself and his copartner, on moneys drawn from the firm over and above what he was entitled to draw, on the amount of a debt incurred by a third person for which he was liable, and on his share of the net general loss upon the business, from a reasonable time after the firm is dissolved, or from such time as he has had the benefit of the sums withheld by him. *Crabtree v. Randall*, 552.

See BANK; COSTS, 1; PROMISSORY NOTE, 2; RAILROAD, 7.

INTOXICATING LIQUORS.

1. An allegation in a complaint of a sale of intoxicating liquor to T. C. is supported by proof of a sale to T. F. C., if he was the person named in the complaint as the person to whom the sale was made, and was as well known by the one name as by the other. *Commonwealth v. Gormley*, 580.
2. An allegation in a complaint of an unlawful sale of intoxicating liquor to C. is supported by proof of a sale to C., although C., in making the purchase, was acting as the agent of D., if he did not disclose the fact that he was buying the liquor for D. or for some other person. *Ib.*
3. At the trial of a complaint for keeping intoxicating liquors for sale in violation of law, it is sufficient, under the Pub. Sts. c. 100, § 27, for the government to prove that the defendant kept lager beer with intent to sell it unlawfully, without further proof that it was intoxicating, or that it

contained more than three per cent of alcohol. *Commonwealth v. Snow*, 575.

4. At the trial of a complaint for maintaining a tenement used for the illegal sale and the illegal keeping for sale of intoxicating liquors, from April to July, a witness testified that, during that time, the defendant sold and delivered to him a glass of lager beer; and that the beer was taken from a bottle. The defendant testified that the beer sold to the witness was Berlin beer, and contained less than three per cent of alcohol; and that he had kept this same kind of beer down through August, and had kept no other kind of beer since said April. An officer testified, against the defendant's objection, that he went to the defendant's place of business in said August, in the evening, with a search warrant for intoxicating liquors; that, as he entered a certain room, some one put out the light; that he afterwards saw the defendant break a bottle in the room; that he also found a number of broken bottles in the room, but he did not know who had broken them; and that there was a smell of lager beer in the room where he saw the broken bottles. The judge instructed the jury; that if the defendant purposely broke a bottle containing the same kind of beer which he testified he had kept in his place of business from said April down through said August, to keep it away from the searching officer, this act might be considered as evidence bearing on the question of whether the defendant thought the beer was intoxicating liquor. *Held*, that the defendant had no ground of exception. *Commonwealth v. Daily*, 577.
5. At the trial of a complaint for maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, if the defendant relies upon a license as a justification, the burden is upon him, under the Pub. Sts. c. 214, § 12, to prove a license which is broad enough to authorize the acts complained of. *Commonwealth v. Rafferty*, 574.
6. The St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, providing that no person licensed to sell spirituous and intoxicating liquors shall maintain or permit to be maintained, upon premises used by him under his license, screens or blinds, which shall interfere with a view of the business conducted upon the premises, creates a substantive offence; and it is not necessary to allege in a complaint under said statutes that the defendant has violated the conditions of his license, or that he has sold spirituous and intoxicating liquors in violation of law. *Commonwealth v. Costello*, 192.
7. At the trial of a complaint under the St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, alleging the unlawful placing and maintaining of blinds, on a certain day, on premises used by the defendant for the sale of spirituous and intoxicating liquors under a license, there was evidence of the sale of liquor in the licensed room three days before the day named in the complaint, and that, on the evening of the day named in the complaint, the rooms were lighted and voices were heard in the building, which the witness believed came from the bar-room. The judge refused to instruct the jury that there was no evidence that the defendant was carrying on business on the premises described in the complaint, but left the question to the jury under instructions not objected to; and, at the request

of the defendant, further instructed the jury that the government must prove beyond a reasonable doubt that the business of selling spirituous and intoxicating liquors was being carried on at the time set forth in the complaint; and that this was not to be presumed from the fact that the defendant had a license to sell such liquors. *Held*, that the defendant had no ground of exception. *Commonwealth v. Costello*, 192.

8. A complaint, under the St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, alleged that the defendant was licensed to sell spirituous and intoxicating liquors in a certain room in a certain building, which said room was used by him for the sale of such liquors under his license; and that he unlawfully maintained "upon said premises used by him as aforesaid" certain blinds. The evidence was that the blinds were on the outside of the windows of the room. *Held*, that there was no variance. *Ib*.
9. On a complaint, under the St. of 1880, c. 239, § 2, as amended by the St. of 1881, c. 225, for maintaining blinds on premises licensed for the sale of spirituous and intoxicating liquors, the jury are authorized to find that blinds on the outside of a room, so placed that a person can look into the room only by stooping down and peering through the slats of the blinds, do interfere with a view of the business carried on in the room. *Ib*.
10. The Pub. Sts. c. 100, § 12, providing that no licensee shall maintain, or permit to be maintained, upon any premises used by him for the sale of spirituous or intoxicating liquor under the provisions of his license, any screen, blind or other obstruction, in such a way as to interfere with a view of the business conducted upon the premises, applies to a licensee carrying on business upon the Lord's day, in violation of the conditions of his license. *Commonwealth v. Auberton*, 404.
11. A complaint, under the Pub. Sts. c. 100, § 12, alleged that the defendant was licensed to sell intoxicating liquors in a certain building; and that he unlawfully maintained, "upon said premises used by him for the sale of intoxicating liquors under the provisions of his license, certain screens, blinds, shutters, partitions and other obstructions." It appeared in evidence at the trial, that the defendant maintained in a window of the premises, outside the sash, a frame covered with wire netting, which was submitted to the inspection of the jury. The defendant asked the judge to instruct the jury that they could not convict "unless they should find the article complained of and exhibited to them to be a screen or other article specifically named in the complaint;" which instruction the judge gave, with this qualification, "or something in the nature of a screen." *Held*, that the defendant had no ground of exception. *Ib*.
12. The declaration, in an action by a wife under the St. of 1879, c. 297, alleged that, on divers days and times between dates specified, the defendant sold intoxicating liquors to the plaintiff's husband, and that, in consequence of such sales to and drinking by her husband, he acquired confirmed habits of intoxication, and became and was habitually drunk and intoxicated. *Held*, that it was open to the plaintiff to prove sales of intoxicating liquor, which produced intoxication in her husband, on more than two occasions. *Bryant v. Tidgewell*, 86.

13. An action may be maintained by a wife, under the St. of 1879, c. 297, for all damages sustained by the intoxication of her husband, if such intoxication was caused "in whole or in part" by liquor sold to him by the defendant, although during the time covered by the declaration the husband purchased intoxicating liquor of persons other than the defendant, which caused his intoxication in part. *Bryant v. Tidgewell*, 86.
14. In an action by a wife, under the St. of 1879, c. 297, for damages sustained by the intoxication of her husband, alleged to be caused by liquor sold to him by the defendant, the defendant is not responsible for all damages caused to the plaintiff by any habits of intoxication to the formation or confirmation of which the defendant contributed, unless the liquor sold by the defendant caused, in whole or in part, the intoxication complained of. *Id.*

See COMPLAINT, 2.

JAIL.

See ESCAPE.

JUDGMENT.

Judgment is correctly rendered for the amount found by an auditor, if his report is the only evidence at the trial. *Eagan v. Luby*, 548.

See APPEAL, 2; INSOLVENT DEBTOR, 2; PAUPER, 1; SUPERIOR COURT, 2.

JURISDICTION.

If a party who appeals from a judgment of an inferior court does not file a bond with surety to the adverse party, as required by the Pub. Sts. c. 154, § 52, and the St. of 1882, c. 95, § 1, conditioned to enter and prosecute his appeal, and to satisfy any judgment which may be entered against him in the Superior Court, on the appeal, for costs, the Superior Court has no jurisdiction of the action, and it may be dismissed at any time before judgment, although the appellee has entered a general appearance in the Superior Court. *Santom v. Ballard*, 464.

See POOR DEBTOR, 1; REPLEVIN, 1.

LAND DAMAGES.

See CONSTITUTIONAL LAW, 1; EMINENT DOMAIN; SHERIFF.

LANDLORD AND TENANT.

See ASSAULT, 2; USE AND OCCUPATION.

LAW AND FACT.

See BETTERMENT; CORPORATION, 4; WAY, 1, 4.

LEASE.

See CONSTITUTIONAL LAW, 1.

LIBEL.

1. In an action for a libel published in a newspaper, the defendant is not entitled, for the purpose of showing that he had no malicious intention, to prove that there were reports in circulation, similar to those contained in the newspaper, before the publication of the libel, without showing that he knew of such reports. *Lothrop v. Adams*, 471.
2. In an action for libel, in charging the plaintiff with ill-treating his family, there was evidence that the plaintiff had, on a certain occasion, kicked a daughter. The wife of the plaintiff, who testified for him, denied the kicking. On cross-examination, she was asked by the defendant whether her son was present on the occasion, and answered that he was. The defendant then asked her whether the son had subsequently been asked by the plaintiff what he should say if asked if his father kicked the daughter. The witness answered in the affirmative. *Held*, that the judge, before whom the case was tried, might in his discretion allow the plaintiff to ask the witness what the son said in reply, although the son was present at the trial, and was not called as a witness. *Ib.*
3. In an action for libel, in charging the plaintiff with cruelly treating one of his children, the defendant put in evidence that the plaintiff had whipped a daughter. The plaintiff then testified that he whipped her because he believed that she had been stealing. *Held*, that the defendant had no ground of exception to the refusal of the judge to allow him to show that the daughter had not in fact been guilty of stealing. *Ib.*
4. Under the Gen. Sts. c. 129, § 77, which provide that, in a civil action for libel, the defendant may upon the trial give in evidence the truth of the matter charged as libellous, "and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved," if a libel is published in a newspaper owned by copartners, all the partners are responsible for the express malice of one of them. *Ib.*
5. If a newspaper publishes a statement that, at the trial of A. before an ecclesiastical tribunal, the testimony showed certain facts, which are set forth, and which are libellous in their character, and A. brings an action against the owner of the newspaper for libel, declaring upon the statement so published, and the answer sets up the truth of the statement, the defendant is not entitled to a ruling that he is not called on to show that the plaintiff was not guilty of the matters alleged. *Ib.*
6. Although a newspaper has the right to publish a fair report of the proceedings before an ecclesiastical tribunal, yet if a report in a newspaper contains defamatory matter, and does not purport to be a full report of the proceedings, and the answer to an action of libel based upon such report does not set up the defence of privilege, the jury cannot treat it as privileged. *Ib.*
7. In an action for libel, the defendant asked the judge to instruct the jury that, if the charges proved were of such a nature or character that the

existence of those not proved, if any, would not affect the plaintiff, he could recover only nominal damages. The judge instructed the jury that, if they should find that some of the charges were true and some not true, they should give the plaintiff only such damages as he had proved that he had sustained solely by reason of those that were not true. *Held*, that the defendant had no ground of exception. *Lothrop v. Adams*, 471.

LICENSE.

A licensee of a table kept for playing at pool for hire is liable, under the St. of 1880, c. 94, to the penalty prescribed by the Gen. Sts. c. 88, § 70, if he allows such table to be used for hire on his premises, after he has been informed, by the clerk of the town whose selectmen granted the license, of the contents of a certificate of a vote of the selectmen revoking the license, although he had no notice of their intention to revoke it; and the St. of 1876, c. 147, does not apply. *Commonwealth v. Kinsley*, 578.

See COMPLAINT, 2; CONSTITUTIONAL LAW, 2, EMINENT DOMAIN, 1; INTOXICATING LIQUORS, 5-11.

LIMITATIONS, STATUTE OF.

See MALICIOUS PROSECUTION, 2.

LORD'S DAY.

See INTOXICATING LIQUORS, 10.

MALICIOUS PROSECUTION.

1. The discharge, without any action by the grand jury, of an accused person, who has been bound over upon a complaint to await such action, and the entry of a *nolle prosequi*, are such a termination of the proceedings against him as will sustain an action for a malicious prosecution. *Graves v. Dawson*, 419.
2. In an action for a malicious prosecution, the plaintiff may recover damages for his imprisonment upon a warrant, although the action is brought after the time when by the statute of limitations an action for false imprisonment would be barred. *Ib.*

MANDAMUS.

See TOWN.

MARRIAGE.

See PAUPER, 2.

MARRIED WOMAN.

See HUSBAND AND WIFE; TRUST AND TRUSTEE, 3.

MASTER AND SERVANT.

1. A laborer, engaged in the service of a city under the direction of a foreman, cannot recover against the city for personal injuries resulting from the negligence of the foreman, who is his fellow-servant, in the absence of evidence that the foreman was incompetent, or that the city was negligent in employing him or in providing suitable apparatus for the work in which they were employed. *McDermott v. Boston*, 349.
2. A workman, engaged in blasting at a quarry, assumes the risks of his employment, and cannot maintain an action against his employer for an injury sustained in consequence of his obeying an order of another workman who superintends the blasting. *Kenney v. Shaw*, 501.

See RAILROAD, 4-6.

MEADOW.

See CONSTITUTIONAL LAW, 3.

MEMORANDA.

Resignation of Mr. Justice Endicott, 496.
 Appointment of Mr. Justice Colburn, 508.
 Resignation of Mr. Justice Lord, 589.

MILL.

See CONSTITUTIONAL LAW, 3.

MONEY HAD AND RECEIVED.

A commissioner, appointed by the Probate Court to make partition of land between two tenants in common, who has not been paid for his services, is not entitled, under the Gen. Sts. c. 136, § 59, to recover, as money received to his use, one half of the amount of the charges for his services, from the tenant collecting of the other tenant, upon an execution issued therefor, one half of the expenses and charges allowed by the court, although the amount sued for is included in the sum collected. *Langdon v. Palmer*, 418.

See EXCEPTIONS, 8.

MORTGAGE.

I. *Real Estate.*

1. A person who accepts an assignment of a mortgage, without reading the mortgage, is conclusively presumed to know its contents, and is bound by them. *Smith v. Burgess*, 511.
2. If a person conveys, in fraud of his creditors, land subject to a mortgage, and the grantee, although he does not assume the mortgage debt, pays the mortgage, which is discharged on the record, and then conveys the land to a third person, and afterwards a judgment creditor of the first grantor

levies upon the land by a sale of it as an equity of redemption, the payment and discharge will not be treated as an assignment of the mortgage, such not being the intention of the parties to the transaction, but, under the St. of 1874, c. 188, the levy is void, and the purchaser at the sale cannot maintain a writ of entry to recover possession of the land. *Mansfield v. Dyer*, 374.

3. Under a single mortgage of three distinct parcels of land, situated respectively in three different towns in the same county, containing a condition that, on default in the payment of the sum secured thereby, the mortgagee might "sell the granted premises, or such portion thereof as may remain subject to this mortgage, in case of any partial relief therefrom, in said town, on the premises," a sale by him of one of the parcels, by public auction, for breach of the condition, in accordance with the terms of the power in the mortgage, and in form legally conducted, is valid, although the amount realized from the sale, which is indorsed on the mortgage note, is less than the amount of the debt secured by the mortgage. *Pryor v. Baker*, 459.

See ACTION, 5; DEED, 2; EQUITY, 9; EXECUTION; INSOLVENT DEBTOR, 1; TRUST AND TRUSTEE, 11; USE AND OCCUPATION.

· II. *Personal Property.*

See ACTION, 6-8; BILL OF LADING, 1.

MOTION TO QUASH.

See INDICTMENT.

NAME.

See AMENDMENT, 1; COMPLAINT, 1; INTOXICATING LIQUORS, 1.

NATIONAL BANK.

See BANK; CORPORATION, 3.

NEGLIGENCE.

See MASTER AND SERVANT, 1; PLEADING, 6; PLEDGE; RAILROAD, 2, 4.

NOTARY PUBLIC.

See PROMISSORY NOTE, 4.

NOTICE.

See BILL OF LADING, 2; LICENSE; TRUST AND TRUSTEE, 9; WAY, 2-4.

NUISANCE.

See DISORDERLY HOUSE; EQUITY, 2, 4, 5, 14; HUSBAND AND WIFE, 3; INFORMATION, 1.

OFFICER.

See ACTION, 6-8; RETURN; REWARD.

ORDER.

1. An order drawn upon a committee composed of several persons may be accepted by such persons individually. *Smith v. Milton*, 369.
2. An acknowledgment by the drawee of the receipt of an order does not constitute an acceptance of and promise to pay the order. *Ib.*

See PLEADING, 5.

PARENT AND CHILD.

See ASSAULT, 1.

PARK.

See BETTERMENT.

PARTITION.

See EXCEPTIONS, 16; MONEY HAD AND RECEIVED.

PARTNERSHIP.

If two persons enter into an arrangement, by which one is to furnish a yard and put it in order for manufacturing bricks, and the other is to furnish the materials and labor for making the bricks, which are to be divided between them when made, but there is no agreement to share the profits and losses of the business, they do not become partners even as to third persons. *LaMont v. Fullam*, 583.

See EQUITY, 8; INTEREST; LIBEL, 4; PLEADING, 1, 7; SIGNATURE; TAX.

PAUPER.

1. In an action by the town of S. against the town of H. for the support of a female pauper, whose settlement through her husband was alleged to be in H., it appeared that the town of A. had previously sued the town of S. for the support of the same pauper; that in that action S. set up in its answer that the pauper's husband had his settlement in H.; that the question of his settlement was the only question in issue in that action; that, on filing the answer, H. was requested by A. to assume the prosecution of the action, and did so, and that A. obtained a judgment, which was satisfied by S. *Held*, that these facts did not estop S. from raising the question of the husband's settlement in the present action. *Shutesbury v. Hadley*, 242.
2. In an action by one town against another for the support of a female pauper, the main issue was whether the pauper's husband, who was an alien, and was assessed and paid taxes in the defendant town from 1837 to 1845, and resided there until April 1, 1846, was domiciled there on April

- 1, 1836. The plaintiff offered in evidence a certified copy from the town clerk's records of another town, purporting to be the copy of a marriage certificate made in April 1837, certifying that the magistrate joined the pauper's husband and a former wife in marriage on May 24, 1836, and describing the husband as of the defendant town. The plaintiff also introduced evidence that the husband had lived in the defendant town several months before his first marriage, but the witnesses were unable to fix the date of that marriage. The defendant admitted that the husband was married to his first wife on the day named in the certificate; but objected to the admissibility of the certificate to show that at that time the husband was a resident of the defendant town. But the judge admitted it as *prima facie* evidence that the husband's residence was in the defendant town on the day named, but not of his residence there before that date. *Held*, that the defendant had no ground of exception. *Shutesbury v. Hadley*, 242.
8. In an action against the town of H. for aid furnished a female pauper in 1878 and 1879, it appeared that the husband of the pauper, an alien, being of age, lived in H. ten years from 1836 to 1846, and paid taxes there for five years during that time; and died in 1872, never having been naturalized. *Held*, that, under the Gen. Sts. c. 69, § 1, *cl.* 12, and the St. of 1868, c. 328, as amended by the St. of 1871, c. 379, the husband of the pauper gained a settlement in H., and that the pauper gained a derivative settlement from him. *Ib.*

PAYMENT.

See EQUITY, 10; EXCEPTIONS, 15; MORTGAGE, 2; PROMISSORY NOTE, 5.

PERJURY.

See VARIANCE, 3.

PLEADING.

I. *Parties to Action.*

1. If two persons, as copartners, make a special contract to do work for another, they must join as plaintiffs in an action for the money due thereunder, although the partnership is dissolved before the work is completed; and if the contract has been fully performed on their part, and nothing remains but a mere duty of the defendant to pay money, a count on an account annexed will lie. *Fish v. Gates*, 441.
2. If two parties to a written contract, whose liability is several, are joined as defendants in one action thereon, under the Gen. Sts. c. 129, § 4, and one of them dies, his executor may be summoned in to defend the action as against him. *Colt v. Learned*, 409.

See DEED, 1.

II. *Declaration.*

3. A declaration alleged that the plaintiff and defendant entered into a written contract, a copy of which was annexed; that the plaintiff was induced

- to execute it by fraudulent misrepresentations of fact by the defendant; that the plaintiff was not bound by it, but was entitled to recover what the labor performed and furnished was reasonably worth; and concluded with an allegation like that contained in an account annexed. *Held*, that it was a good declaration on an account annexed; and that the unnecessary averments might be rejected as surplusage. *Simmons v. Lawrence Duck Co.* 298.
4. A declaration alleged that the plaintiff and defendant entered into a written contract, a copy of which was annexed; that the plaintiff entered upon the performance of the contract, but the defendant neglected to perform his part of the contract, and prevented the plaintiff from performing the contract, whereby the plaintiff was greatly injured and damaged; and concluded with an allegation like that contained in an account annexed. *Held*, that the count contained two inconsistent causes of action, and was bad. *Ib.*
5. A declaration, containing several counts, alleged that W. had a contract with a building committee to build a schoolhouse, and applied to the plaintiff to furnish lumber and materials to be used for the schoolhouse in performance of the contract; that the plaintiff refused to furnish and sell the lumber or materials on the credit of W.; that the defendants, who constituted the building committee, in consideration "that the plaintiff would so furnish and sell to W. the said lumber and materials," promised to accept and honor such orders as W. should draw, and to pay them out of the moneys which should become due to W. under the contract; that the plaintiff sold and delivered said lumber and materials to W.; that certain orders were made and presented, containing a specification that they were to be paid respectively "out of the third and fourth payments;" that these orders were such as the defendants had promised and agreed to accept; that afterwards the third and fourth payments mentioned in the orders were due and payable to W.; and that the defendants refused to pay the orders. *Held*, on demurrer, that it was not necessary to allege that the lumber and materials were used in the schoolhouse; that the declaration did not show that the orders presented were such as the defendants promised to accept; and that the averment that the third and fourth payments were due and payable was sufficient to show a breach of the promise to pay the orders, without alleging that the payments were ordered by the architect, as required by the contract of building. *Smith v. Milton*, 369.
6. In an action against a railroad corporation for personal injuries, the declaration alleged that the defendant's road crossed a certain highway in a city at grade; that, on a day named, while the plaintiff was crossing the track on said highway, and in the exercise of due care, he was struck by one of the defendant's locomotive engines, and received the injuries complained of, "through the negligence and carelessness of the defendant, who carelessly omitted to give any signal while approaching said highway with said locomotive, or warning the plaintiff by ringing a bell or blowing a whistle, or by a flagman or otherwise, that it was dangerous or unsafe then to cross, by reason of the approach of said locomotive." *Held*, that the declaration set out a good cause of action against the defendant at common law, but

did not sufficiently state a cause of action under the St. of 1874, c. 372, § 164; and that, under the declaration, the plaintiff could not recover, unless he was using due care when hurt. *Fuller v. Boston & Albany Railroad*, 491.

See ALTERATION OF INSTRUMENTS, 2; APPEAL, 1; DAMAGES, 3; DECEIT; EXCEPTIONS, 8; INTOXICATING LIQUORS, 12; SIGNATURE; VARIANCE, 1, 2.

III. *Demurrer*.

See APPEAL, 1; EXCEPTIONS, 9.

IV. *Answer*.

7. In an action for taxes assessed by a city upon the personal property of a partnership, evidence that the defendant had retired from the firm before the tax was assessed, and thereafter retained no interest in the firm or in the property taxed, is admissible under a general denial in the answer. *Washburn v. Walworth*, 499.

See CORPORATION, 1; LIBEL, 5, 6; PROMISSORY NOTE, 3; SIGNATURE.

PLEDGE.

1. Two certificates of stock in two corporations, for one thousand shares each, were pledged as collateral security for a debt, the pledgee having the right to sell them, by public or private sale, if the debt was not paid when due. When the debt was payable, and for some time after, the shares of one of the corporations were worthless, and the shares in the second corporation had no known or uniform price, and sometimes they could not be sold at any price. The pledgee sold all the shares at private sale for \$850. In an action by the pledgor against the pledgee for negligence in the sale, the plaintiff was allowed to put in evidence of a sale of one hundred shares of the second corporation at \$1.37½ per share, the day following the sale by the defendant, and a sale of fifty shares of the same stock, three days later, at \$1.12½ per share. *Held*, that the defendant had no ground of exception to the admission of this evidence. *Newsome v. Davis*, 343.
2. The plaintiff delivered to the defendant two certificates of a number of shares of stock in each of two corporations as collateral security for the payment of a debt, "with authority to sell the same without notice, either at public or private sale, or at brokers' board, at the option of the holder or holders hereof, on the non-performance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining after paying all sums due from me to the said holder or holders." *Held*, in an action for loss occasioned by the defendant's negligence in the sale of the stock, that, under the authority given him, the defendant had the right, on the non-performance of the plaintiff's promise, to sell either certificate of stock, or both if the proceeds of the sale of one did not satisfy the debt, and was not bound to divide either certificate into small lots, or to sell the stock immediately on default, or to postpone the right to sell if the stock was then depreciated in value; and that an instruction to the jury that the

defendant "must use the same care, prudence and diligence in the sale of it that a prudent man would in the sale of his own property," was erroneous. *Newsome v. Davis*, 343.

See BILL OF LADING, 1; EQUITY, 11.

POLICE COURT.

See REPLEVIN, 1.

POND.

See CORPORATION, 2; FISHERY; INFORMATION, 1.

POOR DEBTOR.

1. If a magistrate, before whom a hearing, upon the application of a person to take the oath for the relief of poor debtors, is appointed, adjudges the creditor in default upon his failure to appear, he has no further jurisdiction except to discharge the debtor, and cannot proceed to administer the oath and to render a judgment upon charges of fraud filed against the debtor, under the Gen. Sts. c. 124, § 31; and no appeal lies to the Superior Court by the creditor from such judgment. *Longley v. Cleveland*, 258.
2. At the trial, in the Superior Court, of charges of fraud, filed under the Gen. Sts. c. 124, § 31, the jury returned a verdict of guilty on several of the charges. On the defendant's motion for a new trial, the judge set aside the verdict as to some of the charges, and, on the plaintiff's motion, ordered these charges to be stricken from the record. *Held*, that the defendant had no ground of exception. *Held, also*, that it was not open to the defendant to contend in this court that the evidence admitted under the charges so stricken out might have improperly influenced the jury in rendering their verdict on the other charges, he not having asked for a ruling limiting the evidence admitted under each charge. *Chapin v. Haley*, 127.
3. A charge of fraud, filed against a person upon his application to take the oath for the relief of poor debtors, alleging that the defendant "hazarded and paid the sum of," naming it, "in a certain unlawful game played with cards, and called draw poker or bluff," and that the defendant "did hazard and pay the said sum," naming it, "in said gaming as aforesaid, which is prohibited by the laws of this Commonwealth," sufficiently alleges that the defendant had hazarded and paid money in some kind of gaming prohibited by the laws of the Commonwealth. *Ib.*
4. A charge of fraud, filed against a person upon his application to take the oath for the relief of poor debtors, alleged that he hazarded and paid a sum named in a certain unlawful game played with cards, and called draw poker. At the trial, the judge instructed the jury "that if they found the game of draw poker, as described by witnesses, to be a game of chance on which money was hazarded upon the kind of cards held by the respective players, or by betting upon the hands so held, and if chips redeemable in money were used by the players in place of money, then it was gaming prohibited by the laws of this Commonwealth." *Held*, that the defendant had no ground of exception. *Ib.*

POWER.

See MORTGAGE, 3.

PRESCRIPTION.

See WATERCOURSE.

PRESUMPTION.

See HUSBAND AND WIFE, 4; MORTGAGE, 1.

PRINCIPAL AND AGENT.

1. In an action by A. against B., to recover the price of certain goods bought by A. on B.'s account and at his request, it appeared that A. sent the goods to a third person instead of to B. *Held*, that B. was entitled to put in evidence a letter to this third person from one with whom A. testified that he left the bill of lading of the goods to send to such third person, and who took full charge of the matter. *McKinney v. Wilson*, 181.
 2. In an action against the owner of a hotel for the price of furniture sold and delivered, on the order of a person who had the general management of the hotel, with the defendant's consent and for his benefit, the only evidence was the report of an auditor, who found that the furniture was suitable for the hotel and was used in its equipment; that the defendant knew that the manager had ordered similar articles from the plaintiff, for which he did not deny that he was liable; that the defendant gave no notice to the plaintiff that the manager had no authority; that, two months after the goods sued for were delivered, the defendant had knowledge of the way in which the goods were ordered, and never offered to return them, or notified the plaintiff to take them away; and that all the goods had, since their delivery, been at the hotel, in the possession and under the control of the defendant; and found for the plaintiff. *Held*, that the questions, whether the manager had authority to buy the goods on the credit of the defendant, and whether, if he had not authority, the defendant had ratified his acts, were questions of fact proper to be submitted to the jury upon this evidence; and that all the findings of the auditor were pertinent and material upon both these issues. *Lawrence v. Lewis*, 561.
- See ACTION, 4; BROKER; CORPORATION, 4; INSURANCE, 1; REPLEVIN 3; SAVINGS BANK, 2, 3.

PRINCIPAL AND SURETY.

See BOND.

PROBATE COURT.

The Probate Court has no jurisdiction to grant to an executor and residuary legatee, who has given a bond conditioned to pay debts and legacies, a

license to sell the real estate of his testator for the payment of debts and charges of administration; and a sale under such license does not deprive the widow of a devisee of a portion of the land sold of her dower therein, or constitute a breach of the bond by which she is injured. *Thayer v. Winchester*, 447.

See EQUITY, 7.

PROMISSORY NOTE.

1. A person, by signing a promissory note after it has been delivered, although for a distinct consideration sufficient to support his contract, does not become a joint and several promisor with the maker, if the original obligation of the latter on the note is not destroyed. *Hove v. Taggart*, 284.
2. A promissory note, payable "on demand or in three years from this date," with interest at a certain rate "during said term or for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable. *Mahoney v. Fitzpatrick*, 151.
3. In an action upon a promissory note, if the answer sets up a release under seal, and the release is put in evidence, the plaintiff may show that the release was obtained by fraud, although no replication is filed by him. *Lyon v. Manning*, 439.
4. A promissory note was dated at "Boston," and following the name of the maker were the words "Brighton District." In an action against an indorser on the note, the evidence tended to show that when the note was given, and until some weeks before it became due, the maker had a place of business in the Brighton District; that, on the day it became due, a notary public went with the note to that place and found it closed and unoccupied; that he made inquiries at a hotel opposite to it, but could find no other place of business of the maker; and there was no evidence that he made any further inquiries, or any attempt to find either the maker or his place of business or residence. *Held*, that the words "Brighton District" did not designate the place at which the note was payable; and that there was not sufficient evidence of a demand upon the maker to charge the indorser. *Demond v. Burnham*, 339.
5. A. sold to B. certain personal property and real estate, taking in payment an amount in money greater than the value of the personal estate, and a promissory note for the residue. The deed of the property was defective as to the real estate, because not under seal. *Held*, that A. could not maintain an action against B. on the promissory note, although B. entered into possession of the real estate, and remained in possession until after the action was brought upon the note. *Curtis v. Clark*, 509.

See ALTERATION OF INSTRUMENTS; EVIDENCE, 8, 11, 12, 14; SIGNATURE.

QUO WARRANTO.

See INFORMATION, 2, 3.

RAILROAD.

1. The charter of a railroad corporation provided that, if the railroad should cross any highway, the railroad should be so constructed as not to impede or obstruct the safe and convenient use thereof; that the corporation should have the power to raise or lower such highway, and, if it should do so, and should not so raise or lower the same as to be satisfactory to the selectmen, the latter might require in writing of the corporation such alteration or amendment as they might think necessary; and that, if the required amendment or alteration was reasonable and proper, and the corporation should unnecessarily and unreasonably neglect to make the same, the selectmen might proceed to make such alteration or amendment, and might recover the cost thereof from the corporation. *Held*, in an action for personal injuries, occasioned by the defective construction of a bridge built and maintained by the corporation over a highway, at a place where the highway had not been raised or lowered, that, under its charter, the corporation was bound so to construct and keep its railroad as not to impede or obstruct the safe and convenient use of the highway; and that, even if the bridge was adequate for such use when built, and an increased use rendered it inadequate, the corporation must alter the bridge. *Cooke v. Boston & Lowell Railroad*, 185.
2. If a railroad corporation so constructs a private crossing over its track, at grade, in a city, that it is held out as a suitable place for foot passengers to cross, it is liable in damages for an injury sustained by a person, using due care, who is thereby induced to enter upon the crossing, and is injured by the negligence of the corporation or its servants. And if the plaintiff at the time he was injured was on that part of the crossing so constructed, it is no defence to an action by him against the corporation for such injury, that he entered upon the crossing at a place not so constructed. *Murphy v. Boston & Albany Railroad*, 121.
3. If a railroad corporation so constructs a private crossing over its track, at grade, in a city, as to hold it out as a suitable place for foot passengers to cross, it is bound to use reasonable precautions to protect them while so crossing. *Ib.*
4. An indictment against a railroad corporation, under the St. of 1874, c. 372, § 163, alleged that at a certain place the railroad crossed a highway upon the same level; that one S. was travelling on the highway and in the exercise of due diligence; that a locomotive engine attached to a freight train was passing the place of intersection; that a locomotive engine was coming in the opposite direction; that while the corporation was thus running the last-named locomotive, it was the duty of the corporation, when approaching said place of intersection, in view of the position of said first-named locomotive and train of cars, to reduce its rate of speed and give proper signals and warnings; but that the corporation neglected to do so, and with said last-named engine ran over and killed said S. *Held*, that the negligence alleged was that of the servants of the corporation, and not of the corporation itself, and that the indictment was insufficient. *Held*, also, that the objections to the indictment were not for formal defects

apparent on the face thereof, within the St. of 1864, c. 250, § 2, and could be taken after the jury had been sworn. *Commonwealth v. Boston & Maine Railroad*, 388.

5. A railroad corporation is responsible, under the St. of 1874, c. 372, § 164, for the neglect of its servants to give the signals required by § 123, when crossing a way at the same level. *Ib.*
6. The St. of 1874, c. 372, § 164, is not limited to cases of injury which do not result in death, but applies as well to cases of loss of life. *Ib.*
7. A secured creditor of the Eastern Railroad Company is not entitled, after the lapse of four years from the enactment of the St. of 1876, c. 236, and five years from the time to which, by the terms of the statute, the claims against the corporation were to be made up as cash, to present his claim for adjustment and to receive certificates of indebtedness therefor, he having in the mean time received interest on his debt at a greater rate than he would have received under such certificates. *Hamor v. Eastern Railroad*, 315.

See ACTION, 2; ASSIGNMENT, 2; BILL OF LADING, 3; COUNTY COMMISSIONERS; DAMAGES, 5; EXCEPTIONS, 12; PLEADING, 6; SHERIFF; TROVER, 2; USAGE.

RATIFICATION.

See PRINCIPAL AND AGENT, 2.

RECEIPTER.

See REPLEVIN, 2.

RECORD.

See COMPLAINT, 1.

RELEASE.

See PROMISSORY NOTE, 8.

REMOVAL OF ACTION.

A., a citizen of this Commonwealth, brought a bill in equity against B., a citizen of another State, and C., a citizen of this Commonwealth. B. filed a petition for the removal of the case into the Circuit Court of the United States, under the act of Congress of March 3, 1875, which was denied, on the ground that, as A. and C. were both citizens of this Commonwealth, and as the controversy between A. and B. could not be fully and finally determined as between them without the presence of C., B. had no right to remove the case. B. then filed an application for a rehearing upon his petition for removal, alleging that, after the filing and service of the bill, and before the filing of the petition for removal, C. wholly released all his interest in the subject matter of the controversy to A., and ever since such

release A. and B. had been the only parties interested in the cause; and that B. had no information or suspicion that the release had been executed before the decision denying the petition for removal, and A., although cognizant thereof, did not disclose the fact to B. or to the court. A. admitted that the facts alleged in the application for a rehearing were true. *Held*, that the former rescript and order should be vacated; and that the petition for removal should be allowed. *Danvers Savings Bank v. Thompson*, 182.

RENT.

See **USE AND OCCUPATION.**

REPLEVIN.

1. The exclusive original jurisdiction of all actions of replevin where the value of the property alleged to be detained does not exceed one hundred dollars, conferred upon trial justices by the St. of 1877, c. 211, § 3, extends, by force of the Gen. Sts. c. 116, §§ 10, 18, to district and police courts; and an action of replevin where the value of the property replevied does not exceed one hundred dollars cannot be brought originally in the Superior Court. *Octo v. Teahan*, 430.
2. That a person receipted for property, attached as the property of another, under a bill of sale from whom the former claimed title, will not prevent him from maintaining an action of replevin against the purchaser of the property at a sale by the attaching officer. *Edmunds v. Hill*, 445.
3. If a person, acting as the agent of another, buys at a sale property which has been attached as the property of a person other than the owner, and takes possession of and claims to hold it for his principal, no demand upon him by the owner is necessary before commencing an action of replevin therefor. *Id.*

RESTRICTION.

See **DEED, 3; EXCEPTIONS, 11.**

RETURN.

An officer's return on an execution recited that, on November 8, 1877, he seized and took all the right in equity or otherwise which the judgment debtor had, on the day when the same was attached on mesne process, of redeeming a certain parcel of real estate; that such seizure was made by posting up a notice stating the time and place appointed by him for the sale, at his office in a certain town, on December 22, 1877, at four o'clock in the afternoon, said notice being dated November 8, 1877, in the post-office in an adjoining town to that in which the land was situated, and on the 20th of said November, being thirty days before the time appointed for said sale, he gave a notice in writing in hand to said judgment debtor of the time and place appointed for the sale, and on the same day posted like notices in a certain store in the town of B. where the land was situated,

and at the post-office in another adjoining town, and caused a like notice to be published in a newspaper in the county, once a week for three successive weeks; that on December 22, 1877, at his office, being the time and place appointed for the sale, he offered the land for sale by public auction, and, as there was no bid for the same, adjourned the sale for one week, at the same place and hour, at which time and place he sold the right in equity (or otherwise) said judgment debtor had, "at the aforesaid time," in and to the land described. *Held*, that the true construction of the return was that the officer sold an equity of redemption, and that the notices required by law were given. *Mansfield v. Dyer*, 374.

See COMPLAINT, 1.

REVIEW.

See COSTS, 2.

REWARD.

If a town offers a reward for the detection and conviction of an incendiary, and information which leads to the discovery of the criminal is first obtained by a state detective, (who is prohibited by the St. of 1875, c. 15, § 6, from claiming any part of the reward,) and he communicates such information to another person, upon whose advice the criminal confesses his guilt to him and to the officer together, and conviction is secured upon proceedings founded on the confession, such person is not entitled to maintain an action against the town for the recovery of the reward. *Dunham v. Stockbridge*, 238.

RULE OF COURT.

See SUPERIOR COURT, 1.

SALE.

See CONTRACT, 6; PLEDGE.

SAVINGS BANK.

1. The by-laws of a savings bank, incorporated subject to the general laws of this Commonwealth relating to savings banks, made it the duty of the treasurer to enter deposits and payments in the books of the bank, and a duplicate of each entry in the book of a depositor; gave him charge of the books of account; and contained the following clause: "He shall draw all necessary papers and discharge all obligations of the corporation; and his signature shall be binding on the corporation." The treasurer, in some instances, borrowed money, representing that it was for the benefit of the bank, and gave his individual notes therefor, and, as collateral security for the notes, deposit-books of the bank, originally genuine and issued to himself or others, which showed certain sums to be still due from the bank, but which the bank had in fact paid to the original depositor in full; or gave as security books which contained entries in whole or

in part fictitious. Some of the books which were originally genuine contained assignments purporting to be signed by the depositors, but their signatures were either forgeries, or were procured by the fraud of the treasurer to assignments in blank, on his representations that the assignments were receipts. In other instances, third persons obtained money on such deposit-books, the treasurer fraudulently stating in writing over his signature, or orally, that the books were genuine, and that the bank owed the money to the persons appearing as assignors of the books. The persons lending the money acted in good faith; but none of the transactions appeared on the books of the bank, or were authorized by its trustees; and none of the money came into its possession. *Held*, that none of the acts of the treasurer were binding upon the bank, although it was the practice of savings banks in this Commonwealth to recognize in some form on their books assignments of deposit-books and the rights of the assignees. *Commonwealth v. Reading Savings Bank*, 16.

2. If the treasurer of a savings bank is instructed by a vote of the finance committee to sell certain rights to take stock in a corporation, the property of the bank, for not less than a sum named, and undertakes to do so, he acts as an agent of the bank, and not as a trustee, although he is also a trustee of the bank and a member of the finance committee; and if he immediately sells the rights to himself and other members of the committee for the price named, which is less than the market value of the rights, without making any attempt to procure purchasers at a higher rate, and pays to the bank the money so obtained, the bank may, without returning the money, maintain an action at law against him to recover the difference between the market value of the rights and the price obtained, but is not entitled to dividends paid on the stock represented by the rights. *Greenfield Savings Bank v. Simons*, 415.
3. The finance committee of a savings bank instructed, by vote, the treasurer of the bank to sell certain property of the bank at not less than a price named. The treasurer sold the property to himself and other members of the finance committee, for the price named, which was less than the market value of the property, and entered the amount on the cash-book of the bank. The vote was afterwards approved by the trustees. *Held*, that this approval was not a bar to an action by the bank against the treasurer to recover the difference between the market value of the property and the price paid, it not appearing that the attention of the trustees was called to the entry in the cash-book. *Id.*

SCHOOL.

A child, who is excluded from a public school in a city by a teacher acting without authority from the school committee, cannot maintain an action against the city under the Gen. Sts. c. 41, § 11, without first appealing to the school committee. *Davis v. Boston*, 103.

SEAL.

See CONTRACT, 2; PROMISSORY NOTE, 5.

SET-OFF..

See BANK; COSTS, 2.

SETTLEMENT.

See PAUPER.

SEWER.

1. A petition under the St of 1869, c. 111, for the assessment of damages for the making of a drain, in the city of Newton, must be addressed, under the charter of that city, St. 1873, c. 326, § 24, to the city council; and, if addressed to the mayor and aldermen, the petitioner cannot maintain a petition to the Superior Court, in the nature of an appeal from the order of the mayor and aldermen, giving him leave to withdraw. *Porter v. Newton*, 56.
2. The St. of 1877, c. 100, authorized a city to widen, deepen, and straighten the channel of a certain brook, in any portion thereof between its source and its outlet in a certain river in said city, and to drain the lands abutting thereupon and adjacent thereto. The city passed an order that the superintendent of streets, under the direction of the highway committee, be authorized to construct a drain on and from a certain street, thence through another street to the brook in question at another street; and that a certain sum be appropriated for said work, to be charged to appropriation for sewerage and drainage. The drain ordered to be constructed did not include within its limits any part of the channel of the brook. A person, through whose land the waters of the brook passed, and above whose land the drain in question emptied into the brook, brought a petition for an assessment of damages caused by the construction of the drain; and offered evidence of the manner in which the drain was constructed until it entered the brook. He also offered to show, by the assistant superintendent of streets of the city, that in building this drain, and in order properly to construct the same, he and the men under him, without the petitioner's consent, entered upon his land, and removed a part of the bed of the brook; and that, in order to make the drain of any practical use, as directed by the city to be made, it was necessary to enter said land and to do what was done. No evidence was offered to show that these acts were done by the witness under the direction of the committee on highways mentioned in the order. The petitioner further offered to show that the city solicitor, in another proceeding, contended that the drain was built under the St. of 1877. *Held*, that there was no evidence that the city, in constructing the drain, acted under the St. of 1877, c. 100. *Ib.*

See AMENDMENT, 2.

SHERIFF.

An objection to the method adopted by a sheriff in empanelling a jury to assess the damages sustained by a person by the taking of his land for a

railroad location, cannot be considered by this court, if the facts stated in the objection are not sustained by the certificate of the sheriff. *Childs v. New Haven & Northampton Co.* 258.

See EXCEPTIONS, 12.

SHIP.

See EVIDENCE, 2; EXCEPTIONS, 7, 14.

SIGNATURE.

In an action against D. and M. the writ described them as "late copartners under the firm name and style of D. & Co.," and the declaration alleged that they made a promissory note signed "D. & Co." D. alone appeared, and filed a general denial. *Held*, that the signature to the note was alleged to be that of D.; and that, under the St. of 1877, c. 163, the genuineness of the signature was admitted, and it was not necessary for the plaintiff to prove that D. was a member of the firm of D. and Company. *Haskins v. D'Este*, 356.

See EVIDENCE, 8, 11-14.

STATUTE.

See CITY, 2, 3; DOG, 1; WIDOW.

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SUPERIOR COURT.

1. Under the Gen. Sts. c. 131, § 31, the Superior Court has power to make a rule, that, when a deposition is taken and certified by any person purporting to be an officer authorized by the commission to take the deposition, “if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting.” *McKinney v. Wilson*, 131.
2. It is within the power of the Superior Court, after a rescript has been sent down by this court, ordering judgment for the defendant in an action at law pending in that court, and an entry has been made by the clerk on the docket of that court, in accordance with the rescript, to suspend the judgment, and to allow an amendment changing the action at law to a suit in equity, during the first term and before any final judgment has been entered by that court by a special or general order; and the exercise of such power is a matter of discretion, to which no exception lies. *Terry v. Brightman*, 536.

See AMENDMENT; APPEAL, 2; COSTS, 1; EXCEPTIONS, 16; JURISDICTION; REPLEVIN, 1.

SUPREME JUDICIAL COURT.

See REMOVAL OF ACTION.

SURETY.

See BOND.

SURPLUSAGE.

See CONTRACT, 2; PLEADING, 3.

TAX.

A partner, who retires from the partnership before the first day of May, and thereafter takes no part in the management of its affairs, and retains no interest in its property, is not liable, under the Gen. Sts. c. 11, § 15, for a tax assessed on that day upon the personal property of the partnership; and the fact that no notice was given by the retiring partner of the dissolution of the partnership does not affect his liability. *Washburn v. Walworth*, 499.

See CONSTITUTIONAL LAW, 4; ESTOPPEL; PLEADING, 7.

TENANT IN COMMON.

See MONEY HAD AND RECEIVED; TROVER, 2.

TIME.

See PROMISSORY NOTE, 2; INSOLVENT DEBTOR, 3.

TOWN.

The election of a water commissioner of a town was required by statute to be by ballot, and at the annual town meeting for the election of town officers. The moderator of the meeting at which such officer was to be voted for appointed a committee of five citizens to count the ballots cast, who reported to him, and he announced the vote, and a certain person was declared elected by a majority of one vote. A motion was thereupon made and carried that the votes be recounted by a new committee. The moderator then appointed a new committee, who recounted the votes and reported that another person was elected by a majority of one vote, and the moderator so declared the vote, stating that it so appeared by the recount. No objection was made to this declaration. The ballots were not preserved, and it did not appear where the ballot-box was during the time that elapsed between the first declaration and the recount. *Held*, on a petition for a writ of mandamus by the person declared to be elected on the recount, that he was entitled to the office; and that mandamus was the proper remedy. *Putnam v. Langley*, 204.

See FISHERY; REWARD; SCHOOL; VOTE; WAY, 2-4.

TRIAL.

See EXCEPTIONS, 6.

TROVER.

1. The delivery of goods by a common carrier to a person unauthorized to receive them, without requiring the production of a bill of lading, but relying upon his representation that he is the holder of it, is a conversion, for which an action will lie against the carrier by the person entitled to the possession of the goods, without regard to the question of the carrier's due care or negligence. *Forbes v. Boston & Lowell Railroad*, 154.
2. The owners of grain stored, according to the usual course of business, in an elevator of the railroad corporation transporting it, are tenants in common in proportion to their respective interests; and a delivery by the corporation of the quantity of grain belonging to one of such owners to a person unauthorized to receive it, is a conversion, for which an action of tort in the nature of trover will lie by the owner against the corporation. *Forbes v. Fitchburg Railroad*, 154.
3. The entering upon land and cutting timber by the agent of a person, under a claim of right, operates to put the latter into possession of such timber as is severed, and gives him sufficient title to maintain an action for the conversion of the timber as against a person having no right in it. *Putnam v. Lewis*, 264.
4. A person, who hires a horse of its owner to drive to a particular place, and in returning unintentionally takes the wrong road, and, after travelling on such road a few miles, discovers his mistake, and takes what he considers the best way back to the place of hiring, which is by a circuit through another town, is not liable in trover for the conversion of the horse. *Spooner v. Manchester*, 270.

TRUST AND TRUSTEE.

1. If a person, who is a legatee and also *cestui que trust* under a will, fraudulently receives from the executor of, and trustee under, the will, property which forms part of the principal of the trust fund, and converts it to his own use, a person subsequently appointed trustee may retain, out of the income afterwards coming to the *cestui que trust*, the amount so converted. *Crocker v. Dillon*, 91.
2. A person having the entire right to dispose of property may settle it in trust in favor of another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation of the estate in such an event. *Broadway Bank v. Adams*, 170.
3. A person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation, so as to prevent his creditors from reaching the income by a bill in equity under the Gen. Sts. c. 113, § 2, cl. 11; and this rule applies to a married woman settling her separate property after marriage, where she has by law the right to make contracts as if she were sole. *Pacific Bank v. Windram*, 175.

4. If a person, having made a settlement in trust of his own property by which he is entitled to the income, assigns his interest under the settlement as security for a debt, he cannot, as against the creditor, subsequently modify the terms of the trust, so as to make the payment of the income discretionary with the trustee. *Pacific Bank v. Windram*, 175.
5. The interest of a person in a trust fund created for his benefit by the will of another, which provides that the trustees may in their discretion pay or apply the income to the benefit of such person, or the members of his family, as the trustees may think proper, and that the income shall not be subject to his debts or assignable by him by way of anticipation, cannot be reached by a creditor of such person by a bill in equity, under the Gen. Sts. c. 113, § 2, cl. 11. *Foster v. Foster*, 179.
6. A testator gave the residue of his property to trustees, upon the trusts, first, to pay all the income to his widow during her life; second, upon her death, to divide the trust estate into as many parts as there were children of him and his wife then living, and deceased leaving issue then living; and third, to hold one of said parts in trust for his son T. and to pay him semiannually the net income arising therefrom to a certain amount annually, and, in the discretion of the trustees, to further pay him the excess of the net annual income above the amount named; with a limitation over, upon the death of T., of the principal and accumulated income. Within a month after the will was proved, before the estate was settled and before any property was transferred to the trustees, and while the widow was living, a creditor of T. brought a bill in equity, under the Gen. Sts. c. 113, § 2, cl. 11, to reach and apply to the payment of his claim the interest of T. in the trust fund. *Held*, that the bill could not be maintained. *Russell v. Milton*, 180.
7. A testator gave to his wife real and personal property for life, which on her death was to be equally divided between his son and his daughters E. and M.; and the will further provided as follows: "The part coming to E., I wish placed in trust, and at her decease, if she leaves no children, paid to her sister M." After the death of the widow, the executor settled his account in the Probate Court, showing a balance of personal property in his hands to be divided. *Held*, that the will created a valid trust; and that a trustee should be appointed for the personal property only. *Hooper v. Bradbury*, 303.
8. Property was devised to trustees in trust to invest and hold it and pay over the net income to the testator's widow during her life, and on her decease to pay over the principal to the children of the testator, the issue of any deceased child to take by right of representation. While the widow was living, the trustees allowed a son of the testator to appropriate to his own use a portion of the income. This son died before the widow. *Held*, that, in settling their account in the Probate Court with the remaindemen, the trustees could not credit themselves with the sum thus appropriated by the son, as part of the estate coming to his children. *Dodd v. Winship*, 359.
9. A lent money held in trust by him for C., and took therefor a note and a mortgage of land, the note being payable to A. personally, and the

mortgage, which was recorded, reciting that the consideration was paid by A., "trustee of C.," and conveying the land to A., "trustee as aforesaid." A. afterwards borrowed money of B. and assigned the note and mortgage to him as security therefor; and the assignment of the mortgage was recorded. The note was delivered, but not indorsed, to B.; and the words "trustee of C." were erased by A. before the mortgage was delivered to B. B. did not examine the record, and his attention was not attracted to the words "trustee as aforesaid," and he had no actual knowledge of their existence, or of the fact that both note and mortgage represented trust funds held by A., but he knew that the money lent to A. was for his personal use. *Held*, that B. was charged with constructive notice of the trust under which A. held the note and mortgage. *Smith v. Burgess*, 511.

10. A number of persons associated themselves together for the purchase of several tracts of upland and flats situated on the sea-shore, for the purpose of improvement and subsequent sales, and took a deed of the premises running to three of their number as trustees, and containing a detailed statement in fifteen articles of the trusts upon which the premises should be held. In these articles, the names of the purchasers and their respective interests were mentioned. It was then provided that the "trustees shall and may pay all lawful taxes and assessments thereon; represent the parties interested in all suits and legal proceedings relating to the premises in any court, and commence the same when necessary; make and execute all necessary agreements relating to the said granted premises; employ counsel, and do all acts and things, and pay out all sums of money necessary and proper in the due execution and management of said property; and, in particular, may provide for proper drainage, and may determine all questions relative to the proper laying out of streets and ways, or building lots, subject to the instruction hereinafter provided for." A subsequent article provided that the interest of the purchasers should be divided into sixty thousand transferable shares of the nominal value of a certain sum each; and that the beneficiaries should be styled "The B. Company." Another article provided that, in case the trustees should find it necessary to raise and expend money before they should receive sufficient funds from sales, they should have authority to collect all necessary sums by assessment upon the shareholders of not more than two dollars per share; with authority to make sales of shares for non-payment of assessments. The last article was as follows: "Said trustees shall not, in behalf of the shareholders, incur liabilities which will not be covered by said assessment of two dollars per share and receipts from sale of company property." *Held*, that, by the true construction of the articles, the trustees were authorized to incur liabilities on behalf of the shareholders to the amount of at least one hundred and twenty thousand dollars. *Cook v. Gray*, 106.
11. A corporation, having large tracts of unimproved lands, for the purpose of borrowing money to discharge existing liens upon the lands and to make them available for sale, issued bonds, the interest on which was payable semiannually, and, as security for the payment of principal and interest, conveyed its lands to trustees on the following trusts: 1. To permit the

corporation to remain in possession, improve and sell the lands, until default should be made in the payment of the bonds, or the interest thereon. 2. To release from time to time from the lien created by the conveyance such portions as, in the opinion of the trustees and of the president of the corporation, might be safely released without impairing the security for the payment of the bonds. 3. To receive and invest the moneys received from the proceeds of sales of said lands, and to pay therefrom interest due on the bonds and the expenses of the trust, and to apply the residue to the purchase and cancellation of the bonds. The deed further provided, that, in case default should be made in the payment of the bonds or of the interest thereof, and for six months thereafter, all the bonds should become payable; that the trustees then might, and, upon the request of a certain number of the holders of the bonds, should, enter and take possession of the granted premises, and should thereafter, as attorneys of the corporation, so long as the default should continue, so manage and dispose of the same as to carry out the purposes of the trust, by sales of the lands from time to time. The corporation covenanted that, in case of default continuing for six months, it would on the request of the trustees deliver up possession of the granted premises, and make any further conveyance required. *Held*, that until entry by the trustees on default in the payment of the principal or interest of the bonds, they had no power to make a contract to sell any portion of the lands. *Foster v. Boston*, 143.

See ASSIGNMENT, 1; CONSTITUTIONAL LAW, 1; CONTRACT, 2; CORPORATION, 3; EQUITY, 8-11.

TRUSTEE PROCESS.

See ACTION, 8; ASSIGNMENT, 3.

ULTRA VIRES.

See CORPORATION, 2.

USAGE.

If a usage exists for railroad corporations in a certain city to deliver to a consignee goods consigned to him by a bill of lading, not containing the words "or order," without requiring the production of the bill of lading, such a delivery is good as against a person to whom the consignee has previously delivered the bill of lading as security for an advance made by him to the consignee. *Forbes v. Boston & Lowell Railroad*, 154.

See BROKER.

USE AND OCCUPATION.

1. If a tenant at will of the mortgagor of land, after notification by the mortgagee, who enters upon the premises after condition broken, that he enters under his mortgage and to collect the rents and profits, makes no answer

- and continues to occupy the land, he is liable to the mortgagee for use and occupation of the land subsequent to the entry. *Lucier v. Marsales*, 454.
2. The facts, that a tenant at will of the mortgagor of premises had been notified by a purchaser of the equity of redemption of the mortgagor that he owned the premises, and requested to hold possession for him and to pay rent to him, which he agreed to do, and that, after an entry upon the premises by the mortgagee for condition broken and notification to the tenant to pay rent to him, the tenant, without replying to such notification, continued to occupy the premises and paid rent to such purchaser after the mortgagee's entry, it not appearing that the purchaser claimed adversely to the mortgagee, nor that, in paying rent to the purchaser, the tenant asserted any title adversely to the mortgagee, do not show that the tenant occupied adversely to the mortgagee. *Ib.*

USURY.

See BANK.

VARIANCE.

1. A declaration, alleging an interference with the plaintiff's right to cut and remove standing timber, is not sustained by proof that he had the seisin or the possession of the timber, without proof that he had the right to cut and remove it. *Putnam v. Lewis*, 264.
2. A declaration alleged that the defendant agreed to pay the plaintiff a certain sum, in consideration that the plaintiff would assent to the election of a certain person as manager, in the defendant's place, of a corporation of which the plaintiff and defendant were both members. The evidence introduced at the trial showed that the consideration of the defendant's promise was that the plaintiff would vote for the person named as manager, and would also vote to increase the salaries of the officers of the corporation. *Held*, that there was a variance between the declaration and proof in regard to the consideration. *Woodruff v. Wentworth*, 309.
3. An indictment for perjury alleged that, on the third day of January, a complaint was made before a trial justice against T., charging him with a certain offence; that T. was arrested and brought before the justice and an examination had upon the complaint on the said third day of January; and that at such examination the defendant committed the perjury for which he was indicted. Upon the production of the record of the trial justice, it appeared that the complaint against T. was dated on the thirty-first day of December, but that the arrest and examination were on the said third day of January following. *Held*, that, under the Pub. Sts. c. 214, § 26, there was no material variance between the allegations of the indictment and the proof. *Commonwealth v. Soper*, 393.

See ALTERATION OF INSTRUMENTS, 2; INTOXICATING LIQUORS, 8.

VENUE.

Even if an action, under the Gen. Sts. c. 85, § 1, to recover treble the amount of money lost by gaming, is a local action, it is discretionary with the

court, under the Gen. Sts. c. 129, § 70, and c. 133, § 14, to refuse to dismiss it when brought in the wrong county, if the defendant has appeared and answered to the merits. *Morris v. Farrington*, 466.

VERDICT.

The rule that, where the same offence is charged in different counts of an indictment, the whole indictment may be submitted to the jury, with instructions, if they find the defendant guilty upon any count, to return a general verdict of guilty, is not applicable in a case where one count of the indictment is bad, and the evidence applicable to such count is submitted to the jury with the rest, against the objection of the defendant. *Commonwealth v. Boston & Maine Railroad*, 383.

VOTE.

If the Legislature gives a town authority to construct a dike, to dig a channel in a river, to cut down and remove any trees or brush, and to remove and carry away any logs, stones or earth which hinder the passage of the water, and the town by vote appoints a committee to do the work, and authorizes it to cause all trees and brushwood to be cut down and removed, and all the logs, drift wood and other obstructions to be removed and carried away, and to remove the material excavated to or beyond the dike, the committee may cause the logs to be burned, if that is the most convenient and prudent way of disposing of them, and may use the material excavated in the construction of the dike. *Hull v. Westfield*, 433.

See TOWN.

WAIVER.

See EQUITY, 12; ESTOPPEL; JURISDICTION.

WAREHOUSEMAN.

See BILL OF LADING, 2; TROVER, 2.

WARRANT.

See COMPLAINT, 1; COUNTY COMMISSIONERS.

WAGES.

See ASSIGNMENT, 3.

WATERCOURSE.

Since the passage of the St. of 1878, c. 183, forbidding the discharge into any river or stream, used as a source of water supply by any city or town, within twenty miles above the point where such supply is taken, of any

sewage, drainage, refuse or polluting matter of such quality or amount as to be deleterious to health, a person cannot acquire by prescription the right so to foul a stream within such distance, as against a city or town using the stream as its source of water supply. *Brookline v. Mackintosh*, 215.

See EQUITY, 4, 5; FISHERY; WATERWORKS.

WATERWORKS.

The St. of 1872, c. 343, authorized a town to take, hold and convey, for necessary uses, the waters of a river, to a certain amount daily, and for this purpose to take and hold lands, build reservoirs, aqueducts and dams; and provided that it should pay all damages sustained by any person in his property by such taking of water, or of any land, rights of way, water-rights or easements, and that the owner of any property taken as aforesaid, or other person "sustaining damages as aforesaid," should recover damages in a mode pointed out. *Held*, that if a person on the river, above the place where the town took water, had acquired the right to foul the stream, there was no taking by the town of such right by implication. *Brookline v. Mackintosh*, 215.

See CORPORATION, 2; EMINENT DOMAIN, 2; EQUITY, 3.

WAY.

1. If a person makes a sidewalk about four feet wide in the street in front of his land, marking the outer line by trees, posts and stones, and at one end the walk touches the line of his land and at the other end is about eight feet from the line of his land, it is error to rule, at the trial of an indictment for obstructing the highway, that the walk is an illegal structure, and not in accordance with the Gen. Sts. c. 45, § 6, but it is a question of fact for the jury whether the walk is an unreasonable obstruction. *Commonwealth v. Franklin*, 569.
2. In an action for personal injuries occasioned by a defect in a highway, the notice given by the plaintiff under the St. of 1877, c. 234, stated the cause of the injury to be a defect in that portion of a certain street in the defendant town lying between the residences of two persons named, "to wit, a stump projecting four inches above the surface of the sidewalk on the east side of said street, between the residences aforesaid." The evidence showed that these houses were about fifty rods apart; that there were three other houses between them; that between two of the other houses there was a stump projecting two and a half inches above the surface of the street, the roots of which, extending easterly and westerly, were distinctly traceable by the eye; and that there was no other stump within the fifty rods. *Held*, that the notice sufficiently designated the place of the injury, within the statute. *Lowe v. Clinton*, 526.
3. In an action for personal injuries occasioned by a defect in a highway, the notice given by the plaintiff, under the St. of 1877, c. 234, stated that, on a day named, he was injured upon a highway "leading from G. to T.

called the Shoddy Road" by "a defect in said road near the blanket mills of F. & Co., the defect being large stones in said road or way, the said stones being at or near a sluiceway in said road." The evidence showed that the accident happened in the night-time; that the stones were set up as guards at the sluiceway, forming part of the culvert thrown across it, and bounded the travelled part of the way on either side; and that there were no other stones in the road for a distance of twenty rods on either side of the sluiceway. *Held*, that the notice sufficiently designated the time, place and cause of the injury, within the statute. *Welch v. Gardner*, 529.

4. If a person, injured by a defect in a highway, does not give the notice required by the St. of 1877, c. 234, until after the expiration of the time therein prescribed, and, in an action by him against the town, the evidence is conflicting as to his physical and mental capacity to have given such notice earlier, it is for the jury to determine whether he was incapacitated from giving the notice until he did. *Ib.*

See CONSTITUTIONAL LAW, 1; DEED, 1; EASEMENT; EVIDENCE, 3-6; PLEADING, 6; RAILROAD, 1-4.

WIDOW.

The St. of 1861, c. 164, provides that a widow may waive the provisions made for her in her husband's will, and shall in such case be entitled to such portion of his real and personal estate, (with certain limitations as to the personal estate,) as she would have been entitled to if her husband had died intestate. The St. of 1880, c. 211, provides that, "whenever any person shall die intestate, without leaving issue living, and shall leave a husband or wife surviving, such husband or wife shall take in fee the real estate of such deceased to an amount not exceeding five thousand dollars in value." *Held*, that the widow of a man dying, after the passage of the latter statute, testate, and without leaving issue living, is entitled, on waiving the provisions of her husband's will, to the benefit conferred by this statute. *Cochran v. Thorndike*, 46.

See APPEAL, 2; PROBATE COURT.

WILL.

1. On the issue whether the execution of a will was procured by the undue influence of a third person, evidence was admitted, for the purpose of showing the state of the testator's feelings towards such third person, of conversations between the testator and his only son and son's wife, at different times during the eight years preceding the date of the will, in which the testator said that he was so under the influence of the third person that he could not resist her when he was in her presence. Evidence was further admitted, for the same purpose, and to show his state of mind towards his son, of a conversation between the testator and another person, on the night before he died, in which he said that he wished to see his son, and that he did not know but he had been deceived. *Held*, that the evidence

was competent for the purpose for which it was admitted. *Potter v. Baldwin*, 427.

2. On the issue whether a testator was of sound and disposing mind at the time of the execution of his will, a witness, who had testified that he saw the testator a short time before, and again after, he had been prostrated by a shock of paralysis, by which it was contended the testator's mental incompetency was occasioned, was asked the following question: "What was the testator's condition and appearance, as regarding his conduct and conversation at the latter interview, as compared with his conduct and conversation at the former interview?" *Held*, that the question was properly excluded. *Ellis v. Ellis*, 469.

See WIDOW.

WITNESS.

1. If, in an action of tort against two defendants, one of the defendants calls the other as a witness, he cannot, before the credibility of the witness has been attacked by the plaintiff, put in evidence, for the purpose of sustaining the testimony of the witness, that the witness was without any means to satisfy any judgment that might be obtained against him. *Bryant v. Tidgewell*, 86.
2. Under the St. of 1869, c. 425, a party producing a witness may contradict his testimony upon any matter material to the issue, by showing that he has made at other times statements inconsistent with his present testimony, having first mentioned to the witness the circumstances of the statement sufficient to designate the occasion on which it was made. *Commonwealth v. Donahoe*, 407.

See EVIDENCE, 7.

WORDS.

- "Committed." See *Commonwealth v. Barker*, 399, 400.
- "Lawfully imprisoned." See *Commonwealth v. Barker*, 399, 400.
- "Laying out." See *Foster v. Park Commissioners*, 321, 329, 333.
- "Locate." See *Foster v. Park Commissioners*, 321, 333.
- "Purchaser." See *Viaux v. Old South Society*, 1, 10.
- "Screen." See *Commonwealth v. Auberton*, 404.

WORK AND LABOR.

1. If a person, who performs work for another under a special contract and is paid in part only for such work, is justified in abandoning the contract, he may recover the value of his work on a *quantum meruit*. *Cook v. Gray*, 106.
2. If a written contract for work to be done is fully performed, the stipulated price may be recovered in an action upon a common count or an account annexed. *Simmons v. Lawrence Duck Co.* 298.
3. If a plaintiff, after doing work under a written contract, has the right to avoid or rescind the contract, he may recover what his labor is reasonably worth, under a common count or an account annexed. *Ib.*

4. In an action on an account annexed for work done and materials furnished, it appeared that the plaintiff had performed work and furnished materials, during the times stated in the account, under two proposals and a subsequent contract. Neither of the proposals was identical in terms with the other, or with the contract, though they had many things in common. They all referred to plans and specifications, which did not appear in the defendant's exceptions on which the case came before this court. There was oral evidence that the plans and specifications referred to in the proposals and the contract were the same, and that the parties intended to reduce their contract to writing, but delayed it until the contract in question was made. There was evidence that the plaintiff had been prevented from performing the final contract by the act of the defendant. The jury were instructed, at the request of the defendant, that the plaintiff could not recover for work done and materials furnished, not done and furnished under the final contract; and were further instructed, against the defendant's objection, that whether the work done and materials furnished prior to the date of that contract were done and furnished under that contract, was for the jury to determine on all the evidence in the case. *Held*, that the defendant had no ground of exception to the admission of the evidence, or to the instructions given. *Simmons v. Lawrence Duck Co.* 298.

See ACTION, 9; PLEADING, 1, 8.

WRIT.

See AMENDMENT, 1.

WRIT OF ENTRY.

See ESTOPPEL.

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